No. 15714

Vol. 3080

United States Court of Appeals

for the Ninth Circuit

See also 3079

TALON, INC., Appellant,

vs.

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Transcript of Record

In Five Volumes

VOLUME IV.

(Pages 1225-1657, inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif. —3-5-58

No. 15714

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(Testimony of William J. Graham.)

The Court: Are you reframing the question or picking it up? [1211]

Mr. Leonard Lyon: I am going to drop out that "extraordinary business."

The Court: Then you are reframing the question.

Q. (By Mr. Leonard Lyon): Did you take into consideration in estimating or fixing what you considered to be the reasonable value of your services in this case the fact that the counterclaim was dismissed?

A. Now, which statement are you referring to, Mr. Lyon?

Q. I think you said your services you thought were worth between 20 and 25 thousand dollars.

A. Then, in answer to your question, yes, I did take into account the fact the counterclaim had not been sustained.

Q. What do you think your services would have been worth if the counterclaim had been successful?

A. I haven't given it thought, but I would say more than I have already expressed.

Q. How much more?

A. I would say at least another $10,000.

The Court: Now, just a minute.

By the counterclaim, when you use the phrase "if the counterclaim had been successful," Mr. Lyon, you are talking about the possibility of an affirmative recovery of damages? [1212]

Mr. Leonard Lyon: Yes, your Honor.

(Testimony of William J. Graham.)

The Court: And the Court having tried this case takes into account that the matters contained in the counterclaim were used as a defense, as well as the basis of a prayer for affirmative relief. How you are going to segregate that, I don't know.

Mr. Leonard Lyon: I will try right now.

Q. Did you devote any time in your work on this case to matters involving the counterclaim, other than matters which were also defenses to the cause of action?

A. I would say, Mr. Lyon, that it was impossible to do that. They were inseparable.

Q. I didn't ask you that.

There are matters involved in the counterclaim independent of any charge of defense in this case, are there not?

A. I think I would have to answer your question the same way.

Mr. Mockabee: Your Honor, if I may interject a minute. You would have to develop the same facts. It was a matter of how you used them, and not as to what facts were developed.

Mr. Leonard Lyon: I think, your Honor, that I am entitled to pursue this line of examination.

The Court: Yes, you are entitled to.

Mr. Leonard Lyon: Because the grounds for the award of [1213] attorneys' fees in this case are not based on any defense that is common to the counterclaim and to the defenses in the action.

The Court: I have been thinking about this, and

(Testimony of William J. Graham.)

I propose, before we get through, to direct counsel in the findings to make findings in connection with this attorneys' fee—I am stating it now very roughly—to the effect that the matter of the counterclaim and the defense had elements in common, with the exception of damage and proximate cause; that the other material as to violation of the antitrust laws and contracts, the conduct of the plaintiff, were common to both its defense and counterclaim; that there were other matters which the Court has taken into account, the obvious invalidity of Poux, the matters discussed here this morning, such as the fact that the suit was brought on six patents, and four were withdrawn; that of the two patents that remained in the case, in the case of Poux the case went to trial on claims only of 1 to 4 and 16 and 17, and in the case of Silberman the case went to trial on claims 1 to 4, 13, 32 to 40.

That matter, of course, has no relationship to the counterclaim for damages.

I am not enumerating all the matters on which findings should be made, but just some of them along this line. [1214]

Then I propose to make some apportionment in the way of a finding between the fee I would have allowed had the defense of unclean hands not involved the antitrust matter, and how much I would have allowed as the case now stands. Only for the purpose of letting there be before the Appellate Court some apportionment in the event that the

(Testimony of William J. Graham.)

Appellate Court should, for instance, disagree with me on the antitrust features of the case. The Court would then have the advantage for what it was worth of my findings as to the case, absent the antitrust matters.

Mr. Leonard Lyon: I think, also, your Honor, that if you can—I don't know if you can—but if you can indicate the different allowances, if the different factors on which you have found the basis for the attorneys' fees were overruled by the Appellate Court. In other words, they may find that one of these items they don't agree with you on, but they do with another, and the time might have been devoted to one of those other items instead of this one.

The Court: I am not going to break it down any further than that.

I don't doubt but what it would be possible to break it down item by item. But I will break it down to give two figures. One, taking into account the antitrust defense, which, of course, is not the complete defense of unclean hands. It is merely another factor added to other things [1215] which make up the complete defense of unclean hands. One figure without the antitrust matter considered, and another figure with it considered.

Further than that, I don't think it can be broken down, and I don't propose, unless you convince me otherwise, to try to break it down further, because there are too many elements that go to make up the defense of unclean hands, and the only one

(Testimony of William J. Graham.)

that seems to me subject to some segregation is the antitrust question.

And, as a matter of fact, I am not convinced that it is a very appreciable amount.

This case rested largely on written contracts and dealings entered into and carried on by the plaintiff. So that I don't think it would be an appreciable amount anyhow.

Mr. Leonard Lyon: My point is this, your Honor: For instance, in your Honor's memorandum opinion allowing attorneys' fees, you say, "Talon's conduct convinces the Court that Talon considered their validity questionable and did not, therefore, permit their adjudication."

Just assume hypothetically that that finding was reversed by the Court of Appeals, but they did not reverse some other basis that you have given for awarding attorneys' fees, the time that the witness spent on that subject certainly should be deducted from an allowance of attorneys' fees, if it can be.

The Court: That is the sort of thing that you can't segregate, and if there is a reversal on that ground it can come back and we will retry it.

The only thing that I propose to make a segregation on is the antitrust feature.

I am not sure that finding in the memorandum goes far enough.

Mr. Leonard Lyon: I would like, and I think——

The Court: I don't intend to be bound, necessarily, by my memorandum. If findings are sub-

(Testimony of William J. Graham.)

mitted which satisfy me in the light of the entire case of their validity, I propose to sign them.

I don't think that counsel need necessarily be bound by a memorandum which I have had to crowd out while I was trying cases in San Diego, and which I worked like a dog on, although you may not be happy with the result. I spent a lot of time on this case, and I was working before court and noontime and after court and Sundays and Saturdays trying to get through this case.

Mr. Leonard Lyon: I think your Honor should have the information that I am going to ask the witness in the next question in considering the subject matter that we have just been talking about.

Q. Are you aware that Mr. Lipson intends to file an appeal from the judgment in this case if it dismisses the [1217] counterclaim?

A. I would say that we had discussed it. We haven't made any decision on it.

Q. You don't know whether Mr. Lipson is or is not going to file such an appeal?

A. At the moment I do not know.

Mr. Leonard Lyon: I might state that Mr. Mockabee advised me that he was.

The Witness: The possibility is that——

Mr. Mockabee: I said, your Honor, probably there would be an appeal.

Mr. Leonard Lyon: I was going to suggest, in view of that, that having taken the evidence at this hearing and having a complete record of it,

(Testimony of William J. Graham.)

the matter of fixing attorneys' fees should await the outcome of this case in the Court of Appeals until we can see what factors are controlling and who comes out where, and fix it then, rather than now.

The Court: Mr. Lyon, you try to put a case in shape in which you attempt to anticipate the more likely things that might occur. You can't anticipate them all. If you don't do any of this segregation, of course the worst that can happen is the court says, "The matter of attorneys' fees reversed, no attorneys' fees," or they say, "Reversed and remanded. Reconsider them on the basis of what we have said." [1218]

As to what might be questions in this case that would interest the Circuit and be decisive, I have some views. The Circuit's views may be entirely different, but I have some views. I am not a polliwog, you know. I have definite views about these cases I try.

I do not think the Circuit is going to be interested or be concerned about an appeal from a dismissal of the counterclaim. I think it is patent that there was a failure of proof of proximate cause, damage and injury, directness of injury as part of proximate cause. There is a possibility because of the novelty of the use of antitrust laws as a defense, that the Circuit might say that I was not justified in basing my findings at all on the antitrust law situation.

That is a possibility, and I consider it not a

(Testimony of William J. Graham.)
strong possibility. But that is a possibility. In which event the Circuit might say, "You fixed this attorney's fee taking into account a defense you sustained which was based in part on antitrust law violation, therefore the matter has to be reversed and go back."

And assuming they agree that attorneys' fees should be fixed, they will say, "Reassess the attorneys' fees taking that into account."

It is for that possibility alone that I would make some segregation, so if they didn't want to send it back [1219] they could see what my findings were, and if they thought they were supported they might dispose of the case.

Mr. Leonard Lyon: I am not trying to press your Honor into any situation here. I am just trying to protect my record as best I can in the event the Court of Appeals says, "Well, how can we look into this attorneys' fee? Why didn't you have these elements developed in the record, if you say they exist?"

The Court: I am not going to cut you off, but I am telling you I will not segregate it.

How can I segregate, for instance, the amount of time that it took to develop a case to convince me there was bad faith on Talon's part, how can I segregate how much time it took to develop the part of the case that concerned Talon's obvious attempt to use an invalid patent to club other zipper manufacturers into line? Or how can I segregate how much time it took to develop that part of the

(Testimony of William J. Graham.)

case which showed the conference in Los Angeles and the attempt at that late date to maintain some kind of a price structure in connection with Talon's articles?

Those things can't be done.

How could I segregate how much time it would have taken to defend this case if Talon said, to start with, "We are not relying on six patents, we are relying on two; we are not relying on all 17 claims, or more, whatever it is, of [1220] Poux, and all the claims of Silberman, but we are only relying on these specific claims?"

Mr. Leonard Lyon: Maybe I can pursue that to some profit.

The Court: All right.

Q. (By Mr. Leonard Lyon): Can you tell us, Mr. Graham, what time you devoted in this total time in this case to the four patents that were dismissed out of the case?

Mr. Mockabee: I just want to inquire if you have any precedent for a request of such a minute breakdown on allocation of time and fees to the various parts of the case?

Mr. Leonard Lyon: This is a very complicated situation, and I don't know one exactly like it, your Honor.

Mr. Charles Lyon: I think the Court should be advised that the pretrial statement was filed, the record will show, a substantial number of years, one or two years, prior to the trial, and the patents that were not relied upon and the claims that

(Testimony of William J. Graham.)

were not relied upon were taken out of the case at the time of the first pretrial.

The Court: You can call my attention to what that date is. However, any work done prior to that time the question is open.

Q. (By Mr. Leonard Lyon): My question is have you any way of telling us what portion of your work on this case prior to that date was devoted to those four patents or any [1221] of the claims that were dismissed?

Mr. Mockabee: I object to this line of questioning, your Honor.

The Court: Overruled.

Mr. Mockabee: There were six patents in suit, and I don't see how Mr. Graham could have devoted a certain amount of time to four of these patents anticipating without any knowledge that they were going to be withdrawn from suit.

The Court: Objection overruled.

The Witness: My answer is, Mr. Lyon, that I cannot give you any breakdown of the time spent on those four patents, the claims in issue in those four patents.

Q. (By Mr. Leonard Lyon): Did you obtain file wrappers of those other four patents?

A. I did not.

Q. Did you locate any art especially useful for those patents that was not useful in the other two?

A. I believe that I did.

Q. Was it cited in your answer?

A. I believe some of the patents listed in the

(Testimony of William J. Graham.)

answers to plaintiff's interrogatories were prior art to the four patents——

Q. Was there a special search run on those other four patents?

A. There was a general search on all of the patents. [1222]

Q. Was your understand with Mr. Lipson, the agreement that we referred to, that you would conduct the trial of this case?

A. When Mr. Lipson first discussed my handling of this case, we never projected ourselves that far into the future, to even consider a trial.

His primary objective was to defend himself so that he wouldn't lose his business. We had no discussion at all about the trial.

Q. There wasn't any discussion about how far you would go in the case in conducting the defense? A. No, there was not.

Q. Why did you not, after devoting all this time to preparation of the case, as indicated by your transcript, conduct the trial yourself?

A. Well, the answer to that is that I discussed it with Mr. Lipson when the trial was imminent, and I explained to him that because of the reduced charges that I had made to him and the relatively small payments that I had received, that I could not afford to spend a great deal of time in California on the trial of this case, without compensation, and that he would have to pay my expenses, and that it would be a more expensive proposition for him to have me come out to try the case than

(Testimony of William J. Graham.)

if he were to have a lawyer here to handle the case.

Q. Did you appreciate in taking that view, that you were depriving Mr. Lipson of the value of your services to any extent that you had rendered him in preparing to try the case?

A. No. I told Mr. Lipson that he had available to him all of the preliminary work that I had done, all of the material that I had developed, and that I would stand ready to help him in any way that I could from New York. And I did do that. This was with the consent of Mr. Lipson.

Q. But you did realize, did you not, that that required him to hire another lawyer to become familiar with the work that you had done?

A. I did. As I stated, it was with Mr. Lipson's consent.

Q. How much of the time of Mr. Mockabee devoted to this case do you estimate was a duplication of the time that you had devoted, and which, if you had continued through to the trial, would have been avoided?

A. I would be speculating if I attempted to answer your question.

Q. To the best of your estimation can you estimate it? A. No, I can't, Mr. Lyon.

Q. When you estimated the total value of all the attorneys' services in this case as between 40 and 45 thousand dollars, what were you estimating to be the value of [1224] Mr. Mockabee's time and services?

(Testimony of William J. Graham.)

A. I would say somewhere between $15,000 and $20,000.

Q. And you figure, then, that Mr. Mockabee's services were worth about the same as yours, is that right?

A. No: I would say less than mine.

Q. Less than yours? A. Yes.

Q. How much less?

A. I gave you the figures. I estimated the value of Mr. Mockabee's services to be from 15 to 20 thousand dollars, and my own from 20 to 25 thousand dollars. So I would say there is a $5,000 differential.

Q. How much additional time was required of Mr. Mockabee, included in those services because he was duplicating the work that you had done?

A. I have no way of estimating that.

Q. Could you have tried this case if you had attended on the basis of the work that you have included in your transcript of your audit here, involving only the additional court time, and such as was spent by Mr. Mockabee after the trial commenced?

A. I think I would have had to have spent a great deal more time in actual preparation than I actually did. Because I didn't try the case.

Q. When did you advise Mr. Lipson that you weren't [1225] going to try the case, what date?

A. It wasn't a question of my advising Mr. Lipson that I wasn't going to try the case; it was the

(Testimony of William J. Graham.)

case of an understanding between us that I was not going to try the case.

Q. What date did that condition come about?

A. My best memory is it was sometime in November or December of 1953 — '54. The case was tried in '55, so it was several months before the actual trial. About five months.

Q. How long had you known that the case was set for trial to commence March 1, 1955, when you withdrew from the case, or withdrew from the responsibility for the trial of the case?

A. I believe I knew in September or October of 1954 that the case had been set for trial on March 1st.

Q. Did Mr. Lipson urge you to continue in the case and conduct the trial?

A. He urged me to continue in the case to the extent of taking further depositions.

Q. In estimating the reasonable value of your services and Mr. Mockabee's in this case, you are unable to tell us how much of the amount you have stated involved a duplication arising out of your withdrawing from the case; is that correct?

A. Withdrawing from the trial. Yes. The answer is [1226] that I can't give you any estimate.

Mr. Leonard Lyon: I think those are all the questions I have of this witness, your Honor.

The Court: All right.

May the witness step down?

Mr. Mockabee: Yes, your Honor. He is his own witness.

(Testimony of William J. Graham.)

The Court: Thank you, Mr. Graham.

The Witness: Thank you.

The Court: Are you going to testify, Mr. Mockabee?

Mr. Mockabee: Yes, sir, I was going to give you an outline.

Mr. Leonard Lyon: I will accept Mr. Mockabee's testimony on his oath as an attorney in this court, without him being sworn, and he does not have to resume the witness stand as far as I am concerned.

The Court: It may be stipulated, then, that Mr. Mockabee's statement that he is about to make will be the equivalent of being under oath?

Mr. Leonard Lyon: Yes, your Honor.

The Court: And subject to cross examination by you, Mr. Lyon?

Mr. Leonard Lyon: Yes, your Honor.

The Court: All right, Mr. Mockabee. [1227]

ALLAN D. MOCKABEE

being called as a witness, testified as follows:

The Witness: I was called into this case on January 26, 1955. Mr. Lipson came to my office and told me that Mr. Graham of New York City had been in the case since its beginning; that it was rather difficult for Mr. Graham to try the case here in Los Angeles; that Mr. Fulwider had been in the case for some time, but his commitments at that time were such that he found it next to impossible to try the case at the time which it was set, because

(Testimony of Allan D. Mockabee.)

of other litigation pending, which he was preparing for trial.

And Mr. Lipson asked me if I would take the case. After some discussion I agreed to take it and attempted to get a little more time for preparation, but in view of the fact it had been set for trial I believe a year before, and the trial date had been postponed several times, I found it necessary to go to trial on that date.

The Court: What date did we go to trial?

The Witness: March 1, 1955.

From January 26, 1955 until after the termination of the trial on March 15, 1955, I hardly had a waking moment in which I was not working on this case. That includes the last four days of January, three and a half days of January, 1955, the entire month of February, which included all regular working days and practically every evening during [1228] that month, usually to a minimum of 11 o'clock in the evening, and sometimes to 12.

When the trial started on March 1st, I would spend an hour to an hour and a half before coming downtown to the courthouse, and each evening during the trial until 11:30 or 12 o'clock at night. Two mornings during trial I was in my office at 4:30 in the morning. There were two week ends during the trial, and those were entirely consumed, Saturdays and Sundays.

After the trial the deposition of Mr. Hepworth and Mr. Napp were taken by me, and the case was reopened and those depositions were admitted.

(Testimony of Allan D. Mockabee.)

During the summer of 1955 I spent time conferring by mail with Mr. Graham with regard to the brief, doing research and preparation for the brief, examining the record, and numerous and long conferences with the president of defendant consumed approximately 18 days time, including the writing of the brief.

I do not have any work sheets for the time spent, but it is indelibly impressed on my mind because I never worked so hard in my life.

The Court: When you speak of 18 days, how many hours?

The Witness: Ordinary days. They would be seven hour days.

I might explain my lack of work sheets at this [1229] time.

I was telling Mr. Graham at lunch today that on the 5th of July a driver of an automobile thought that my garage entrance was an extension of the alley and went through the closed garage door and halfway out of the back wall. I have some records somewhere in that debris. I have not moved it yet, because the insurance company has not yet inspected it. Whether I could find them or not I do not know.

The Court: But you were keeping some work sheets on this case?

The Witness: Yes, sir.

The Court: Between January 26th and the date it went to trial, did you try any other cases?

The Witness: No, sir. I did spend some time

(Testimony of Allan D. Mockabee.)

after my midnight oil burning on this case keeping some of my current work going. But there was no litigation pending at that time, no other litigation.

The Court: In other words, this case, beginning January 26th, had precedence in your work?

The Witness: Absolutely.

The Court: It took the major portion of your time?

The Witness: Yes, sir, it took much more than my ordinary time.

The Court: Of course, during the trial the Court would know, without proof, that you were here every trial day. [1230]

Mr. Leonard Lyon: I wonder if Mr. Mockabee couldn't shorten this by just giving us his best estimate of the number of hours he spent in preparation of this case and the number of hours he spent in the courtroom on it.

The Court: Are you able to make some estimate, have you made some breakdown of that work?

The Witness: Yes, sir.

Do you want that broken down at all, Mr. Lyon? I could give it to you.

The Court: Break it down as to court work and office work.

The Witness: Prior to trial, the end of January and the month of February, 34 seven hour days. During trial, that means time in court as well as time in the morning before court and in the evening after trial days, 48 hours.

(Testimony of Allan D. Mockabee.)

The Court: You say this was during the trial, 48 hours?

The Witness: Yes, including trial time and morning and evening work.

Mr. Leonard Lyon: And you have some subsequent to the trial?

The Witness: Yes, there were depositions of Hepworth and Napp, which together consumed most of an ordinary day. I marked them a half a day each. No. One half a day for those two depositions. I beg your pardon. [1231]

The Court: What do you figure, three and a half hours?

The Witness: Yes, sir.

The Court: What about the time on the brief and work with Mr. Graham?

The Witness: 18 days. And one-half day in court involving re-opening of the case to admit the depositions.

Mr. Leonard Lyon: I might state, your Honor, that I am willing to accept that statement of the witness as to the time that he has employed on the case, without further proof.

The Witness: I made one mistake, your Honor. Mr. Graham just called it to my attention.

Let me start over again. The two weeks of the trial, I have got it written down here and I read it wrong. Nine trial days, days in court. 32 hours during that time spent in the evening, and 16 hours spent in the morning.

(Testimony of Allan D. Mockabee.)

The Court: How many hours do you figure a trial day?

The Witness: They ran pretty close to seven hours, didn't they, your Honor? They started at 9:30 most of them. No. It would be six hours, I guess.

Mr. Leonard Lyon: I don't think the Court would take credit for quite that amount of hours in a court day.

The Witness: Not deducting for any lunch or recess.

Mr. Leonard Lyon: I am willing to take the 48 hour statement of the witness.

The Witness: It isn't 48 hours. I made a mistake on [1232] that, Mr. Lyon.

Mr. Leonard Lyon: What is it?

The Witness: The 48 hours would approximate the actual time for your trial, not counting the morning and evening.

The Court: Your 32 and 16 equal 48. You said 16 hours in the morning and 32 hours in the evening. That would equal the 48 hours.

The Witness: 48 hours outside of court.

The Court: I am trying to arrive at what you figured were hours in court.

Mr. Charles Lyon: I have it as 54 hours. Nine times six is 54.

The Court: Well, I don't know how you lawyers do. If you are in trial and you leave your office at 9:15 for 9:30, or maybe 9, and get things ready, or

(Testimony of Allan D. Mockabee.)

you leave at 9:30 for 10, and you get back to your office at 4:45 or 5, what do you figure?

Mr. Leonard Lyon: We would figure on the basis of all day in court as a per diem. A half day in court is a half day per diem.

The Court: I understand the per diem. But so far we have been talking about hours and so much an hour. What do you figure for hours?

Mr. Mockabee: I think time in court should be under a different category, your Honor. On a per diem basis. [1233]

Mr. Charles Lyon: If you accept my 54 hours, you figure six hours a day, and we certainly know we were off two hours for lunch every day, so that gives you an eight hour day.

The Witness: That is all right.

The Court: We will figure it six hours, then. Is that agreeable for a day?

Mr. Leonard Lyon: I want it understood that I am not quarreling with the witness about his estimate as to the time. I am willing to take his estimate in whatever way he wants to stand on it.

The Court: All right.

The Witness: We will cut it down to a five hour court day.

Mr. Leonard Lyon: No. I don't want you to cut it down to anything that you don't believe is correct.

The Witness: That is agreeable with me. It so happens that your two hours during lunch is not spent in the courtroom.

(Testimony of Allan D. Mockabee.)

The Court: Counsel has agreed that we can take six hours as a court day. So we will take six times nine, which is 54.

Does that complete it?

The Witness: Yes, sir. A total of—I haven't got it properly totaled now, because I have my court days [1234] figured wrong.

The Court: The estimate I have made is based on these figures: Your office work before trial 34 times seven, 238 hours; morning and evenings while trial was going on, 48 hours; depositions, three and a half hours; brief, 126 hours. I think a total of 415½ hours, plus 54 hours in court. Is that about what your figures show?

The Witness: Yes, sir, approximately the same.

Mr. Charles Lyon: 469½.

The Court: All together, yes.

Considering the case that you tried, the nature of it, the responsibility, the problems, questions, novel and otherwise, that arose in the trial, the time and work you have put on it, the result obtained—you haven't yet told me about yourself. I don't know whether you were admitted to the bar a year ago or whether you have been practicing for 50 years.

The Witness: I was admitted to the D. C. bar——

The Court: District Court?

The Witness: District of Columbia, in 1931. At the time that I was admitted I went to a night law school in Washington, National University Law School, whose percentage of successful applicants

(Testimony of Allan D. Mockabee.)

on the bar exam is the highest in the District of Columbia. At that time I was employed by a firm of patent lawyers, Emery, Booth, Varney and Holcomb, [1235] who specialized in patent, trademark, and copyright law, and primarily patent law. That was until 1934.

At that time Mr. Emery died and we had just begun, the year before, to feel the effects of the depression——

The Court: The Court has a very vivid memory of those days. I started to practice in 1928.

The Witness: For about 20 months I was with the United States Government, occupied in work which had nothing to do with patents.

I wound up in the City of St. Paul, Minnesota working for the Government, and after being there approximately ten months I formed an association with Williamson and Williamson, patent lawyers in Minneapolis.

The Court: What year was this, now?

The Witness: From 1936 to 1949.

In 1949 I came to Los Angeles and became associated with Harold W. Mattingly, who died very shortly after I came here, and also with William Edward Hann. Mr. Hann and I entered into a partnership. Mr. Hann died in June of 1951. I then practiced alone here in Los Angeles, and in November, 1955 became associated with Fred Miller of Hazard and Miller, although I still carry on my own personal practice.

(Testimony of Allan D. Mockabee.)

The Court: Isn't there a Mattingly presently active in the patent practice in one of the firms?

Mr. Leonard Lyon: His name is still carried by a firm, [1236] but he has been deceased since 1951.

The Court: That is the Mattingly——

The Witness: That is the Mattingly of whom I speak.

The Court: Of the Fulwider firm? What is the name of that firm?

The Witness: Fulwider, Mattingly and Huntley.

The Court: All right.

That completes the history of your practice, does it not?

The Witness: I believe it does, sir.

The entire time, except for the 20 months that I mentioned that I worked for the Government, has been entirely engaged in patent practice.

The Court: All right.

Are you ready to be cross examined by Mr. Lyon?

The Witness: Yes.

The Court: We didn't ask you about a fee.

Knowing what you do about this case that you tried, the problems, intricate and otherwise, that were involved, the time you spent in preparation, in trial, on the briefs, the result accomplished, taking into account your experience as you have related it here in the law and patent field—any other factor that you want considered, Mr. Lyon?

Mr. Leonard Lyon: I would like to reserve an

(Testimony of Allan D. Mockabee.)

opportunity to cross examine on the answer to this question. [1237]

The Court: What, in your opinion, is the reasonable value of your services to the defendant?

The Witness: I would say, based upon the time expended, the conditions under which I had to prepare for trial, including approximately 100 prior art patents, and the various angles of this case, including the purely patent defenses and the antitrust defenses, in that period of time, was in the neighborhood of 15 to 18 thousand dollars.

The Court: In fixing that figure are you taking into account, as well, the factors which I stated in my question?

The Witness: Yes, sir, I am taking all those into consideration.

The Court: We will take a short recess. I have a visitor that I want to see.

(Recess taken.)

Cross Examination

Q. (By Mr. Leonard Lyon): Mr. Mockabee, have you a written agreement with the defendant covering the compensation to be paid you for your services in this case? A. I have not.

Q. Did you arrive at a definitive oral agreement with the defendant as to your compensation for those services?

A. Yes, we did; and it hasn't remained the same since we first arrived at it. [1238]

Q. When did you arrive at that agreement?

(Testimony of Allan D. Mockabee.)

A. In the beginning, it was on the day of January 26, 1955, the first time that Mr. Lipson approached me concerning taking over the preparation of the trial.

Q. Is that the agreement that is still in effect?

A. No, it is not.

Q. What was that original agreement, what were the terms?

A. The original agreement was to pay me on a weekly basis the total sum of $2,000, and 25 percent of any recovery.

Q. When was that agreement modified?

A. I don't recall the exact date. It was not too long before trial. As a matter of fact, it wasn't very long after the first one, where, after I had realized what I was in, I told him that I thought——

Q. Wait a minute. Let's fix a date first.

A. It was during the month of February.

Q. Before trial? A. Before trial.

Q. What time in February?

A. It was in the latter part of February, probably a week before trial.

Q. And you arrived then in the latter part of February at a modified agreement?

A. Yes. [1239]

Q. That is an oral agreement?

A. That is true.

Q. Is that the agreement that is still in effect?

A. Yes, in so far as Mr. Lipson is concerned.

Q. What are the terms of that agreement?

A. I will give a little explanation of it. After

(Testimony of Allan D. Mockabee.)

having worked night and day, as I have explained, in the preparation of this suit, I told Mr. Lipson that this thing involved more than I had realized before I had read anything about it and come to the first agreement on the thing, so it was decided, and agreed between us, that I would receive $5,000 and 25 percent.

Q. Of a recovery? A. Of a recovery.

Q. And that is the agreement that is still in effect? A. That's right.

Q. Mr. Mockabee, did you have an established per diem rate that you charged uniformly to your clients at the time you were employed?

A. I had a uniform rate.

Q. That you charged uniformly to your clients?

A. Yes, for office work.

Q. What was that hourly rate?

A. For office work it was $30 per hour.

Q. And you had actually been paid at that rate by [1240] clients in 1954?

A. Yes; and prior to that time.

Q. Did you have an extensive practice in 1954?

A. In 1954?

Q. I am using that, because that is just ahead of January, 1955?

A. No, it was not extensive then.

Q. Can you state the total amount of your billings for your services as a patent lawyer or patent attorney for the year 1954?

A. No, I couldn't guess at it.

Q. Well, could you approximate them?

(Testimony of Allan D. Mockabee.)

A. I wouldn't like to, because I don't know what to base it on right at the moment.

Q. Mr. Mockabee, you filed an income tax return that year, did you not? A. Yes, I did.

Q. Don't you remember on what basis you paid your taxes? A. For that year, no.

I remember particularly 1951. I think my gross receipts of fees in 1951—I remember that because of some circumstances that haven't anything to do with this case, of course—were about $26,000.

Q. For the twelve months?

A. Yes. [1241]

Q. Can you remember approximately what they were in '53 and '54, or '52?

A. No. I will tell you they dropped off considerably, and I don't know. It was much less than that. The reason for that is rather involved.

When I first came out here in '49, William Edward Hann and Harold Mattingly were together, I associated with them; a month later Mr. Mattingly died, and for a period of approximately a year there was controversy concerning to whom the practice belonged, whether it was to Mr. Hann or to a third party. As the result of that controversy, and various notices sent out by opposing claimants to the practice, many of the clients drifted away, and when Mr. Hann died in 1951, in June of 1951, there was some other business that he had carried out here from his firm in Detroit, the firm of Harney, Dickey and Pierce, and when Mr. Hann died that business sort of died with him, as far as my

(Testimony of Allan D. Mockabee.)

practice was concerned. So there was a considerable drop after the year 1951.

Q. On what basis were you associated with the firm of Mattingly, Fulwider and Huntley?

A. I was not associated with that firm at all.

Q. You were associated with Mr. Mattingly?

A. That is correct.

Q. On what basis? [1242]

A. During the months that I was here, when Mattingly was alive, it was purely as an associate.

Q. What? A. As an associate.

Q. What do you mean by that? Were you an employee or a member of the firm?

A. I was not a member of the firm. I was working on a percentage basis, a commission basis entirely.

Q. You can't remember how much money you made per month for that year, your net return?

A. About $800 per month, I would say. That was for a period from August, 1949 until January of 1951.

Q. On what basis were you employed by Mr. Hann?

A. Until January of 1951 as an associate on a commission basis.

Q. Do you mean an employee on a percentage basis? A. That is correct.

Q. Can you tell us how much per month you averaged while you were employed by Mr. Hann?

A. I would say it ran about the same during that entire period, around $800 a month. And then

(Testimony of Allan D. Mockabee.)

in January, 1951 I entered into a partnership with Mr. Hann.

Q. How long were you in partnership with him before he died?

A. From January, 1951 until June 27, 1951, which was [1243] the date of his death.

Q. Can you tell us what your earnings were as a patent lawyer during that time, your share of the earnings, average per month? Just estimate it.

The Court: That part of the year, do you mean?

Mr. Leonard Lyon: Yes, your Honor.

The Witness: As closely as I can recall it, it ran about the same, about $800 a month.

Q. Can you estimate approximately what your——

A. I might say that we had an understanding regarding what I was taking out of the firm, because the physical assets of the firm were Mr. Hann's. I was new out here and hadn't built up any clientele.

Q. Was that the period when you were employed or retained to make some drawings by our firm?

A. I have never made a patent drawing in my life or any kind of a drawing for anyone.

Q. In 1952 you were self-employed, is that right? A. Yes.

Q. Independent, you were not associated with any other attorney? A. That is correct.

Q. And that was true in '53 and '54?

A. That is correct.

Q. And in '55 up to November? [1244]

(Testimony of Allan D. Mockabee.)

A. That is correct.

The Court: Who did you go with in November of '55?

The Witness: Hazard and Miller.

Q. (By Mr. Leonard Lyon): Can you tell us what your average, or estimate what your average earnings were from your practice of your profession during the years 1952, '53, and '54, when you were self-employed?

A. They were considerably less, because of the circumstances which I just related regarding the controversy over to whom this practice belonged.

It seems to me in 1951 and '52, that is, the last half of '51 and the first half of '52—I think in 1952 my receipts of fees were in the neighborhood of $24,000.

Q. For the year? A. Yes.

Q. And how much in '54?

A. Much less. As I said, I don't recall now, but it was considerably less.

Q. Did you ever in your practice prior to January, 1955, earn from your practice, as much as $9,000 a month?

A. Did I personally receive that much?

Q. Yes. A. No.

Q. Did you ever receive as much as half of that in any one month, or over a period of time? [1245]

A. No, I have never personally received that, but I have billed that much?

Q. To whom? A. To clients.

Q. Did they refuse to pay it? A. No.

(Testimony of Allan D. Mockabee.)

Q. What became of the bill? Were they paid?

A. What particular time are you speaking of? I may be confused.

Q. I am speaking about the time when you were self-employed in 1953 and 1954.

A. Oh, no. Let's see now. I don't believe in 1953 and 1954, but in 1952 I think there were months where they ran as high as $4,500, $5,000 per month.

Q. That is the maximum you ever billed?

A. To the best of my knowledge at the present time.

Q. Is this the first patent case you have ever conducted yourself as the counsel conducting the case?

A. It is the first one I have conducted myself, because I have always been with someone during the more than 20 years of practice.

Q. Do you consider if you were compensated at the rate of your established per diem, which you say was $30 per hour, that that would be a reasonable compensation for your services in this case?

A. No, I do not.

Q. Have you any agreement with the defendant whereby you will receive any compensation other than the $5,000 that you have referred to?

A. Yes, I stated that if there was any recovery in this case I would receive 25 percent of it.

Q. But if there was no recovery, you have no agreement to receive any more money; is that correct?

(Testimony of Allan D. Mockabee.)

A. That is true. But I do not consider that the value of the services.

Q. Can you give us a list of some representative clients of yours who in the year 1954 actually paid you at the rate of $30 per hour for your services?

A. Glass-Tex Corporation, General Pacific Corporation, Good Humor Corporation of California, Crown Body and Coach Company.

You can remember these clients singly and at times when the occasion arises, but it is awfully hard——

Q. These are clients, that you mention, whose names appear on your books for 1954?

A. That is correct.

Q. And who were billed at the rate of $30 per hour? A. Yes, sir.

Q. You do have books, do you?

A. Yes, I do have books. [1247]

Modernaire Corporation of San Leandro, California.

The Court: I am a little surprised at this cross examination.

(Off the record discussion.)

The Witness: I would still like to emphasize the fact that the period from approximately part of 1952, I would say up until the present time, was due a great deal to the controversy over who was to get the clients which constituted the practice of Harold W. Mattingly.

The Court: Mr. Mockabee, a lawyer is a lousy

(Testimony of Allan D. Mockabee.)

witness anyhow, so just answer the questions you are asked.

Q. (By Mr. Leonard Lyon): Your last remarks do not apply to 1953 and 1954, is that correct?

A. The remarks I just made?

Q. Yes. A. Yes, they do.

Q. Is that still continuing?

A. Absolutely.

Q. Did your work in this case include work on the counterclaim?

A. It did in so far as it affected the defenses in the patent action; and, naturally, Mr. Lipson, president of the defendant, and Mr. Graham, and I, discussed matters of the counterclaim and considered ways and means of procedure with regard to the counterclaim, as well as to the patent case. [1248]

Q. Have you any basis on which you could estimate the time, a portion of the time, that you devoted to this case that was devoted to the counterclaim as distinguished from the defense of the case?

A. No. And I don't see how it could be divided.

Q. When you took over this case, you found that you had to become familiar with the work that was done by Mr. Graham, did you not?

A. I had to become familiar with what had gone on in the proceedings prior to the time I came in, I had to become acquainted with the prior art, the file histories, and all of the papers.

Q. And that involved a duplication of work that Mr. Graham had done?

A. I do not know, because I wasn't in the case

(Testimony of Allan D. Mockabee.)

and I didn't observe the work that Mr. Graham did.

Q. You say you conferred with Mr. Graham extensively?

A. Yes. And he appeared to know what the case was about.

Q. Did he seem to be ready to try the case?

A. I don't know that I ever asked him that, and I don't know that I discussed the case with him with that in mind, that question in mind. He seemed to know what all the facts were.

Q. He did seem to be apprised of all the facts?

A. He certainly did.

Q. Did you get information from him and did he furnish you with facts in the case to a large extent?

A. He furnished me with all the prior art, all the papers and the complete file and the proceedings prior to the time I came into it, and the other evidence that had been collected by Mr. Graham before I came into it.

Q. And you can't estimate at all how much of the time you devoted to the case was a duplication of the work that Mr. Graham had done?

A. No, I can't, because I didn't know whether Mr. Graham was coming out here to try the case, or not, or whether Mr. Fulwider was going to try it.

Mr. Leonard Lyon: I think that is all, your Honor.

The Court: Step down.

Any further testimony?

Mr. Mockabee: Your Honor, I would like at this

time, in order to keep Mr. Beehler from having to stay around too much longer, to present Mr. Beehler as an expert on behalf of the defendant on the question of fees.

The Court: All right.

Mr. Mockabee: Mr. Beehler, will you take the stand, please. [1250]

VERNON D. BEEHLER

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name.

The Witness: Vernon D. Beehler.

Direct Examination

Q. (By Mr. Mockabee): What is your occupation, Mr. Beehler?

A. I am a patent lawyer.

Q. Do you practice alone?

A. No. I am a partner in the firm of Huebner, Beehler, Worrel and Herzig.

Q. Of this city? A. Of this city.

Q. How long have you engaged in patent practice?

Mr. Leonard Lyon: Maybe we can shorten this up. I know Mr. Beehler. If counsel will tell me whether he is being called as an expert on fixing fees, or as an expert on patent law.

Mr. Mockabee: I think the hearing is on the question of fees, your Honor.

The Court: An expert on fees.

(Testimony of Vernon D. Beehler.)

Do you stipulate, first, that he is a qualified patent lawyer?

Mr. Leonard Lyon: I certainly will. [1251]

The Court: Let's skip Mr. Beehler's qualifications, then.

But tell me, Mr. Beehler, how long have you practiced?

The Witness: 19 years.

The Court: What year were you admitted?

The Witness: 1937 to the bar of Illinois.

The Court: How long in California?

The Witness: Since '44. Twelve years.

The Court: Go ahead.

Q. (By Mr. Mockabee): Mr. Beehler, have you engaged in extensive patent litigation?

A. "Extensive" is a qualifying word. I would say an average amount of patent litigation.

Q. Are you at all familiar with the present litigation?

A. I am not familiar with the litigation, although I have looked at the pleadings and have been informed as to the character of the litigation.

The Court: Did you go through the files?

A. I went through the files, yes.

Q. (By Mr. Mockabee): Are you acquainted with the type of art involved in the litigation?

A. I am acquainted with the type of art from having looked at the patents involved, the patents in question, and [1252] to a degree the type of patents involved in the defense material, prior art patents.

(Testimony of Vernon D. Beehler.)

Q. Judging from your past experience, would you say that the preparation and defense of a suit of the subject matter of the present suit would be that of a simple case or a complicated case?

A. A complicated case, without question.

Q. How much do you charge for your office time for the preparation of patent litigation?

Mr. Leonard Lyon: I object to that as irrelevant.

The Court: What he charges is irrelevant.

I think he can testify as to what was the reasonable value of his services in preparing patent litigation.

Q. (By Mr. Mockabee): Will you answer that question, what you think is the reasonable value per hour for the preparation of patent litigation?

Mr. Leonard Lyon: I would like voir dire, if I might, on that, your Honor.

The Court: We are probably wasting time, because it is not his fee that is being charged. It seems to me that what you have to do is to make some record here as to what this man knows about this case.

He has looked the file over and the exhibits, I take it.

The Witness: Yes. [1253]

The Court: Is that right?

The Witness: The patent exhibits.

The Court: You heard Mr. Mockabee testify to his background and experience, and so forth?

The Witness: Yes.

(Testimony of Vernon D. Beehler.)

The Court: You heard Mr. Graham testify as to his experience?

The Witness: I did.

The Court: You are personally acquainted with Mr. Fulwider, I suppose?

The Witness: I know him well, yes.

The Court: Did you hear the stipulation that Mr. Fulwider had done some work on the case and had billed the sum of $1,374.35?

The Witness: I heard that testimony, yes.

The Court: And that he was in the case approximately two years, while Mr. Graham was in charge of the case Fulwider was handling some matters on this end.

The Witness: Yes, I knew that.

The Court: Do you know this Kleinman who was an attorney from another city? No. He is local here, isn't he?

Mr. Mockabee: Yes. He is a general lawyer; not a patent lawyer.

The Court: Do you know him?

The Witness: No, I don't know Kleinman at all.

The Court: You heard the testimony that he had billed the defendant and been paid $890?

The Witness: I heard that, yes.

The Court: You understand this case was filed what date—'49?

Mr. Mockabee: March, 1949. October, 1949.

The Court: And from the file, I take it, you noticed the various proceedings that had gone in the case?

(Testimony of Vernon D. Beehler.)

The Witness: I noticed they were voluminous, yes.

The Court: And then the trial started on March 1st, 1955 and continued to March 15, 1955, with approximately 1,137 pages of testimony.

May it be stipulated that those are the dates and the pages?

Mr. Leonard Lyon: Yes, your Honor.

The Court: Mr. Mockabee, do you also stipulate?

Mr. Mockabee: Yes, sir.

The Court: And then the matter was briefed. Did you notice the briefs in the file?

The Witness: I didn't examine the briefs, no. I understand it was briefed, but I didn't examine the briefs.

The Court: The Court filed a memorandum opinion in the matter. Did you see that?

The Witness: I have not read it. I am somewhat aware of its length, and I know it has been referred to, and I [1255] have heard some of the content of it discussed, but I haven't read it.

The Court: You looked over the two patents involved?

The Witness: Yes. I didn't study the patents, but I did look them over.

The Court: Are you aware of the fact that the Court has held both patents invalid and not infringed.

The Witness: I am aware of that.

The Court: And that the Court has alternately

(Testimony of Vernon D. Beehler.)

said that if valid and if infringed, that the defense of unclean hands is available to the defendant?

The Witness: That portion of the case I am not familiar with, or the proceedings.

The Court: What other matters do you want to inquire into?

Mr. Mockabee: I wanted to get into the matter of the rate of charge.

Q. (By Mr. Mockabee): In a case where these numerous issues were involved and the defendant was successful in securing a decision declaring the patents invalid and not infringed, that the plaintiff was guilty of unclean hands, misuse of the patents in violation of the antitrust laws, would you state that the defense of that case warranted a substantial fee?

A. I would state that it would warrant a substantial fee. [1256]

Q. Would you say that because of the outcome of the case just recited, that counsel for the defense should or should not be awarded at least as high a fee as is generally charged in the defense of patent cases?

Mr. Leonard Lyon: I would like to ask a question of the witness by way of voir dire and try to avoid objections, if I can.

The Court: You may.

Voir Dire Examination

Q. (By Mr. Leonard Lyon): I would like to ask you, Mr. Beehler, what criteria do you understand

(Testimony of Vernon D. Beehler.)

govern the award of attorneys' fees in a patent case?

A. Whether the fee should be awarded or the amount of the fee?

The Court: What are the factors?

Q. (By Mr. Leonard Lyon): Not whether they should be awarded, but by what they are.

A. How much they should be?

Q. Yes.

The Court: I think you mean what factors or criteria should be taken into account in determining a reasonable fee in a case where a court has ordered it would allow fees?

Mr. Leonard Lyon: That is correct, your Honor.

The Witness: I would consider, first, what is a reasonable fee for services of the kind in question, under ordinary circumstances, let us say. I am not mindful of those circumstances related today, because I couldn't enumerate them. I am aware of their character. But from my own experience and from a general knowledge of how fees are charged, I say that these things are fair to consider:——

The Court: The things you are going to tell us now?

The Witness: Yes.

The Court: All right. What are they?

The Witness: The difficulty of the case is one; the value of a win to the client is another, how much it means to his business; another factor is whether, if for example I were trying the case all by myself, if I had to work 14 hours a day I would

(Testimony of Vernon D. Beehler.)

say the value of my services would be different from what it would be if I worked six or seven hours a day and had an assistant——

Q. (By Mr. Leonard Lyon): Are you speaking now of the value to you, rather than the client?

A. As an example, we are talking about what are reasonable attorneys' fees under the circumstances.

Q. What are the factors that you should consider in arriving at a reasonable attorneys' fee?

A. That is correct, yes.

Whether I mentioned it, or not, whether the case [1258] is won or lost, that would be an element in the value of how much the fees would be.

The Court: Would you consider the length of time that it took to prepare the case for trial?

The Witness: By all means.

The Court: Would you consider the length of trial?

The Witness: Well, I would consider the length of trial, of course, in the computation of reasonable attorneys' fees, except——

Q. (By Mr. Leonard Lyon): Are you considering this question from the standpoint of what is a reasonable attorney's fee from the standpoint of Mr. Mockabee, what he should get, or are you considering it from the standpoint of what a reasonable attorney's fee should be allowed to the client irrespective of whether or not the client pays it to the lawyer? A. The latter.

What a particular attorney—what value he may

(Testimony of Vernon D. Beehler.)

assign for his services, or somebody else may assign to it, I haven't been considering, particularly.

Mr. Mockabee: Your Honor, I think the question before the Court is, what is the value of the services rendered.

The Court: Just a minute. He hasn't finished his answer. Go ahead.

The Witness: My answer is that what I am saying here [1259] has to do with what is a reasonable attorney's fee for the services that the client received.

Q. (By Mr. Leonard Lyon): Do you think a factor to be considered in that is the degree of professional ability, skill and experience of the lawyer rendering the services.

A. Professional ability?

Q. The degree of professional ability, skill and experience of the lawyer rendering the services?

A. I will answer that in three pieces, if I may. I would say that the ability of the lawyer should be considered, and his skill should be considered, because it is reflected in his ability. I would put his experience last, because I can readily appreciate that a man with 25 years of experience might do more poorly than a man with ten years of experience.

Q. Do you think that a factor to be considered is the professional character, qualifications and standing of the attorney? A. Yes.

Q. You have stated that you are going to give your opinion based on your experience on matters

(Testimony of Vernon D. Beehler.)

of this kind. Are you acquainted with the award of attorneys' fees in numerous cases, patent cases in this District? A. Not numerous cases.

Q. In any? A. Some. [1260]

Q. Are you acquainted with the basis on which they have been awarded in this District, on the basis of $200 per day for each day of court trial, and twice that number of days at that rate for preparation, such as Judge Mathes uses?

A. I am not familiar with that particular formula, no.

Q. What formulas do you know of having been used in this District?

A. I don't know of any formulas. I am not aware that they have used a formula.

Mr. Leonard Lyon: That is all for the moment, your Honor.

Direct Examination—(Resumed)

Q. (By Mr. Mockabee): Mr. Beehler, do you always, in charging a client for litigation, base your fee entirely upon time?

A. Not always upon time.

Q. What do you consider an important factor, other than time, which enters into the estimation of the value of your services in litigation?

Mr. Leonard Lyon: May I hear that question, please?

(The question was read by the reporter.)

Mr. Leonard Lyon: I will not object to that question if it will be understood that the witness is

(Testimony of Vernon D. Beehler.)

explaining it in connection with the reasoning that he follows in testifying as to what would be a reasonable award in this case. [1261] Otherwise I don't think his own values are involved.

Mr. Mockabee: Leave out the word "yourself"; instead of your services, just say "services."

The Witness: May I have the question?

(The question as amended was read by the reporter as follows: "Q. What do you consider an important factor, other than time, which enters into the estimation of the value of services in litigation?")

The Witness: I think my answer to that would be a repetition of some of my answers to Mr. Lyon's questions.

Q. (By Mr. Mockabee): I was trying to emphasize a point. I will put it this way:

Does the result obtained affect the value of services? A. Yes.

Mr. Mockabee: That is all, your Honor.

The Court: You haven't asked him his opinion as to any amounts and time.

Mr. Mockabee: I beg your pardon.

Q. (By Mr. Mockabee): In a case such as the case at bar, do you consider that the time spent in preparing for trial, during trial, and subsequent to trial, such as on final briefs, is worth more than on a simple case involving less time? [1262]

A. Well, I think I can answer it this way: We are rather accustomed to assign a value to an attorney's time in trial, and I am accustomed to think in

(Testimony of Vernon D. Beehler.)

terms of $200 a day for trial time. In my opinion that rate should apply to depositions as well as court time.

In picking that value for time, I am accustomed to consider a trial day as the number of hours in court, plus some preparation in advance of the 10 o'clock hearing or 9, as it may be, and some windup time at the close of court after 4 o'clock, if that be the time. But I don't consider the trial day midnight hours.

With respect to preparation before trial, in my view it is equally important, ofttimes more important, than time spent actually in court.

Q. What do you think would be a proper value per hour for the time spent in preparation or out of court?

A. In my view $30 an hour would be average.

Q. Do you think in some cases this amount might be increased?

A. In some cases the amount could very reasonably be increased.

The Court: Now, you have given us figures here which you say you are accustomed to charge and you are accustomed to think is proper, and so forth. From what you know of this case — we are interested in the fees in this case—what [1263] would be your ideas of a reasonable fee, your opinion of a reasonable fee, either by the hour or in toto for the trial, or for the work of all the attorneys in it, or any way you want to give it to us.

The Witness: Under the circumstances as I un-

(Testimony of Vernon D. Beehler.)

derstand them the way this case was prepared for and tried, in my view, in my opinion, the reasonable rates which I just mentioned, $30 an hour and $200 a day, would be insufficient.

Q. (By Mr. Mockabee): Do you have any opinion as to what a reasonable and proper rate would be?

A. I should say an increase in that between 20 and 50 percent would not be unreasonable.

Mr. Mockabee: That is all.

Cross Examination

Q. (By Mr. Leonard Lyon): Do you know of any other cases, to your knowledge, where fees have been awarded on that basis in a patent case?

A. On what basis, if you don't mind saying?

Q. The basis that you just suggested would be proper in this case.

A. I can't point to a basis of award for attorneys' fees in any cases, to answer the question the way you frame it.

Q. Do you regard it as unusual in a patent case that there be a defense of antitrust violation or misuse sustained? [1264] Is that an extraordinary thing nowadays in patent suits?

A. That such a defense be sustained?

Q. Yes.

A. I don't know whether I consider that extraordinary, or not.

Q. The defenses are pleaded in many patent cases, are they not? A. Yes.

(Testimony of Vernon D. Beehler.)

Q. And you know a reasonable number of them in which they have been sustained, do you not?

A. I am appreciative of the fact that many times defenses are pleaded, many defenses are pleaded, and some are more important than others, and that a defendant puts in all of the defenses he can hope for, some of which he doesn't expect may be too strong, but nevertheless if they are available to him I know that he puts them in and hopes for the best.

Q. Do you mean to testify that your measurement of the reasonable value of the services in a patent case such as this would be the same, irrespective of who appeared as the attorney in the case—I mean irrespective of the standing or professional experience of the earning power of the attorney that appeared in the case?

A. I am aware that one attorney may charge more than another. [1265]

Q. What I mean is, is it your testimony that you are disregarding that factor in arriving at the figure that you have given?

A. I am aware that a client may expect to pay one lawyer more than another.

Q. Would this fee that you have stated you think would be a reasonable fee, $200 a day and $30 an hour, be your testimony, irrespective of what the experience or the professional skill or standing of the attorney trying the case is?

A. If I may put it this way: If the life of my business depended on it, and a man appeared for

(Testimony of Vernon D. Beehler.)

me and won for me, I don't think that I would draw the line too sharply as to whether or not he was the man of highest standing in the community or one who had not yet made a reputation.

Q. In other words, it is your view that what governs is what is accomplished in this particular case, rather than the standing or professional status of the attorney before the case is tried; is that right?

A. I would say that when the man demonstrates his ability by the successful outcome, his ability deserves to be measured that way, rather than by what other people think of him.

Q. You have heard the testimony in this case that various lawyers participated in its preparation, and do you [1266] understand that that involves some duplication of effort?

A. I wouldn't call it duplication. Two heads are better than one.

Q. One of them retires in favor of the other, so we have that situation.

A. Well, not even that. Because I am quite well aware that frequently in patent suits, and probably more frequently than not, there is more than one lawyer on each side, and we don't consider it there a duplication of effort, because one lawyer contributes one thought to the defense or the prosecution, and another lawyer contributes another thought, and the contribution of the two of them frequently results in more than double the ability.

Q. You were here during Mr. Graham's testi-

(Testimony of Vernon D. Beehler.)

mony, in which he conceded that his withdrawal from the case involved some duplication, were you not?

Mr. Graham: I don't like to interrupt, but I object to the statements of counsel for the plaintiff about my retiring from the case.

I did not retire from the case; I just did not plan to be at the trial, and later did appear at the trial.

Mr. Leonard Lyon: I didn't mean withdraw from the case in the final sense, but——

The Court: Reframe your question.

Mr. Leonard Lyon: ——but he turned the trial over to [1267] Mr. Mockabee, after being in the case for four years, except that he appeared and conducted some examination on the antitrust phases of the case.

The Witness: Yes, I am aware of those circumstances.

Q. (By Mr. Leonard Lyon): It is your testimony that in spite of those circumstances there was no duplication of work in this case?

A. I strongly suspect, Mr. Lyon, that the defendant got more for his money by the shift than if he had left it all in the hands of the man who started it.

Q. You mean to say that you think Mr. Mockabee being brought into the case produced a different result than if Mr. Graham had handled it by himself?

A. I didn't say that. I made no reference to result.

(Testimony of Vernon D. Beehler.)

Q. When you are testifying that a reasonable fee is a figure of $30 an hour, do you mean to say that that would be a reasonable fee irrespective of how long the attorney devoted to preparing a case.

A. When you say "how long," do you mean the number of hours?

Q. Yes. Suppose he took a year to prepare a case that another man would prepare in a month, would your testimony still be the same?

Mr. Mockabee: Your Honor, I think this is a little off the subject. It hardly took me a year's time to prepare the [1268] case, as the evidence shows.

The Court: Overruled.

The Witness: I think I will need the question again.

(Question read by the reporter.)

Q. (By Mr. Leonard Lyon): On that point, I mean by "testimony would be the same," do you still say that there should be an award as a reasonable attorney's fee of $30 for each hour used in the preparation of the case?

A. If I understand your question, one man takes a year to prepare——

Q. Yes, and another man does it in a month.

A. ——and another man does it in a month, and we are considering the number of hours in each day the same?

Q. Yes.

A. So one man takes twelve times as long as the other?

(Testimony of Vernon D. Beehler.)

Q. Yes.

A. If the man in one month does all in that month that the other man did in a year, then their services would be comparable.

Q. Have you sufficient knowledge of the circumstances in this case, so that you feel prepared to say that you believe that an award should be made of $30 an hour for all the time put in in preparation of this case by all the lawyers?

A. From my knowledge of what has happened, I wouldn't [1269] think that would be enough.

Q. Do you think you have sufficient knowledge of this case to say that all of the time was required that was put on the case by all the lawyers?

A. I don't have enough knowledge of the case to know whether time was wasted.

Q. Would you consider that an award of $200 per day for court trial time in this case, plus twice that amount for outside preparation, was consistent with the award of reasonable attorneys' fees by the courts in this District that you know about?

A. I couldn't answer that question, because I am not familiar enough with the circumstances on which the courts in this District based their findings of attorneys' fees.

Mr. Leonard Lyon: That is all, your Honor.

The Court: May the witness step down?

Mr. Mockabee: Yes.

The Court: We will adjourn until 10 o'clock tomorrow morning.

Do you have further evidence?

Mr. Mockabee: We want to put Mr. Lipson on the stand for a little while.

If it doesn't inconvenience the Court too much, can we make it 9 o'clock again? Mr. Graham has his family with him and they have a reservation on a two-something train [1270] tomorrow afternoon that they would like to make.

The Court: Is 9 o'clock all right?

Mr. Leonard Lyon: It is all right with me if it is all right with the Court.

The Court: Nine o'clock is all right.

How much time would you want tomorrow?

Mr. Leonard Lyon: I am going to ask the Court when this proceeding is over if it will allow me to submit the record in this case to my client and ask my client if they will suggest what they believe would be a reasonable fee in this case.

I have my own ideas, but I don't like to be put in the position of stating them until I have checked with my client.

The Court: Why should we take what the client thinks is a reasonable fee? They are not experts on attorneys' fees.

Mr. Leonard Lyon: It would be in the nature of a stipulation. And I am not empowered to make a stipulation as an attorney for the client without that client's permission.

The Court: I understand that, but are you going to offer any proof of the reasonable value of the services here?

Mr. Leonard Lyon: I want to ask the client if

they want to put on any proofs. They may not want to put on any proofs at all. [1271]

The Court: I take it the record has been practically made. I don't know what else Mr. Lipson might have that would be pertinent to this issue.

Can you get in touch with them before court tomorrow morning?

Mr. Leonard Lyon: We don't know how it would be possible to do that. They are in Pennsylvania.

The Court: What do you suggest, we continue it?

Mr. Leonard Lyon: As soon as the reporter can get me the record I will send it back to them immediately and ask them to read it, and tell them that I want to make a statement to the Court on what I consider to be the proper attorneys' fee in this case, along the line your Honor indicated you would like this morning. And I propose to say so much, and I want to know if they have any objection to my saying so before I say it.

Otherwise I feel my hands are tied. I don't feel as an attorney in the case I can make a proffer of a stipulation of that kind without consulting my client.

Mr. Mockabee: Your Honor, I think the plaintiff had some knowledge of this.

Mr. Leonard Lyon: I already tried to do this once with their permission, Mr. Mockabee, and we couldn't agree, and I don't want to, unless Mr. Mockabee wants me to, state to the Court what figures he and Mr. Graham asked me to [1272] agree to.

Mr. Mockabee: I have no objection, if Mr. Lyon is willing to relate the whole circumstances.

The Court: Let's take it up tomorrow morning at 9 o'clock.

(Whereupon at 4:50 an adjournment was taken to reconvene at 9 o'clock a.m., Friday, August 3, 1956.) [1273]

Friday, August 3, 1956, 9:00 a.m.

The Court: Call the case.

The Clerk: 10450-C Civil, Talon, Inc., vs. Union Slide Fastener. For further trial.

Mr. Mockabee: Your Honor, I would like to, in just a few seconds, supplement my qualifications or experience.

It has been some years ago, but I made a number of extensive patent investigations of zipper methods and apparatus for United-Carr Fastener Corporation, for Scoville Manufacturing Company, and for a German concern whose name I cannot remember.

The investigation was of machines of a type different from the Silberman machine in suit, but they did include methods of formation of the zipper elements and methods and apparatus for attaching the elements to the tape.

So much for that, your Honor.

The Court: What did that investigation consist of—going over the art?

Mr. Mockabee: They were made personally by me in the Patent Office. I made searches thoroughly covering the zipper art. Some of them were infringement investigations to determine whether cer-

tain proposed constructions infringed then patents. There were investigations to determine whether certain patents in the art belonging to other companies would be [1274] valid in view of the extent of the investigation which I made hoping to find something that the Patent Office had not found.

Some of them were merely novelty investigations, but most of them dealt with validity and infringement.

Now, your Honor, I would like, if I may, to call Mr. Leonard Lyon to the stand.

Mr. Leonard Lyon: If your Honor please, I stand on my privilege as an attorney not to be called as a witness in the case. I think I should present my views as an attorney in the case.

The Court: Aside from the propriety of it for just a minute, I don't know that you have any such privilege, a general privilege not to be called as a witness. Even judges can be called in their own courts as to facts that they know. But I anticipate that probably what Mr. Mockabee is going to do is to call you as an expert. Is that it?

Mr. Mockabee: Not exactly, your Honor. I am going to call him with regard to facts which certainly I don't believe are privileged information, relating to the trial of this case.

Mr. Leonard Lyon: All I know about the trial of this case I learned as an attorney, your Honor.

The Court: What you may have learned as an attorney might be privileged and it might not.

Mr. Leonard Lyon: That is correct.

The Court: That doesn't answer it.

Are we just wasting time, or what are you getting at, Mr. Mockabee?

Mr. Mockabee: Mr. Lyon extensively yesterday dwelled on the amount of cases that I had tried alone, and I would like to get a little bit of the other side of the picture on this thing, which I think would be properly in the record.

The Court: What would you propose to prove by Mr. Lyon?

Mr. Mockabee: One thing, I would like to ask Mr. Lyon when he last tried a case by himself. I don't think that is privileged matter.

Mr. Leonard Lyon: There is no award of attorneys' fees involving my services in this case, your Honor.

The Court: I am not going to take time to do that. I have tried enough patent cases to know that an important case is rarely tried by one lawyer, and I know what goes on in my court. I have seen the Lyon firm present on many occasions, and I know that generally there are a couple of them present. Once in a while one would be present.

It isn't going to assist me any.

As I indicated by my irritation yesterday, I was a little resentful of the cross examination of you. We are not going to go any further into the matter by any examination of Mr. Lyon on that matter.

Mr. Mockabee: I think the record is clarified on that point then, your Honor.

There is one other question that I would like to ask Mr. Lyon. If he did not agree in discussion with me about a week to ten days ago that a fee for my

services, a reasonable fee for my services, was not $16,000.

Mr. Leonard Lyon: You suggested that to me, but I didn't make any commitment on behalf of my client or myself about it.

Mr. Mockabee: Didn't you say you saw no objection to a fee of that type?

Mr. Leonard Lyon: I said I hoped that the client would agree to the fee.

Mr. Mockabee: In other words, in your opinion it was not an unreasonable fee?

Mr. Leonard Lyon: I didn't agree to that.

I did express the belief that Mr. Graham's fee was without question out of line. I think you remember that.

Mr. Mockabee: But you did——

Mr. Leonard Lyon: I told you that your fee would be considered and that I hoped that the client would go along in reaching an agreement with you on what your fee was.

Mr. Mockabee: In other words, that you would recommend it to your client?

Mr. Leonard Lyon: That involved other factors about settling the case, too. [1277]

Mr. Mockabee: Would you care to explain all those factors.

The Court: That is something that I don't want to go into.

Mr. Leonard Lyon: That's right.

The Court: The discussion between you on possible settlement, or even possible settlement of an

issue in the case, such as the amount of a reasonable attorneys' fee, would not be proper.

All right.

Mr. Mockabee: My point was that if Mr. Lyon thought that a certain fee was not unreasonable, I don't think that fee should reflect any amount of money in settlement of the case.

The Court: This was apparently a discussion between you to settle an issue, and any statements made in connection with that, when an agreement was never reached, would not be admissible. To put it in evidence, it would be an admission, and that is why negotiations looking toward the settlement of a case or the settlement of an issue are not properly put in evidence.

Counsel should be free to discuss matters without having it later said that one of them had made an admission.

I won't hear any evidence on that.

Mr. Mockabee: All right, your Honor.

Mr. Graham: If your Honor please, I would like to call [1278] Mr. Lipson to the stand.

The Court: What issue is this on?

Mr. Graham: This is largely, your Honor, corroboration of my own testimony, and there are a few matters that I did not testify to that Mr. Lipson's testimony would be of more value than mine, because mine was hearsay.

The Court: All right.

The Witness has been sworn in the trial, but swear him again.

PHILIP LIPSON

called as a witness herein by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Philip Lipson.

Direct Examination

Q. (By Mr. Graham): Mr. Lipson, do you recall having a series of telephone conversations with me commencing in December of 1949 and extending into 1950, during which the matter of attorneys' fees was discussed with you?

A. Yes, I do.

Q. Do you recall having a meeting with me in New York in the latter part of 1950 at which the matter of attorneys' [1279] fees was also discussed?

A. Yes, I do.

Q. Can you tell the court briefly what that discussion was?

A. As I recall, Mr. Graham, I contacted you, because you were recommended to me, not principally because of the fact that you were known in the zipper art, but because I was told you were a man with a heart that would take the case at issue whether there was a lot of money involved in it or not.

When I spoke to you I appealed to you that I had contacted other attorneys and was informed that a thorough investigation and a defense of a case of this type here involving these patents would run in the neighborhood of $50,000. Having been a

(Testimony of Philip Lipson.)

corporation organized and capitalized at $50,000, that was equivalent to being thrown out of business.

I spoke to you and explained to you the situation, that we were unable to raise such fees and that I was informed by the various members of the industry that it had been the Talon practice in the past to start cases against various competitors——

Mr. Charles Lyon: Just a minute. I object to what he has been informed by other people in the industry, and move to strike it.

The Court: It is what he was telling counsel as part of a conversation by which they arrived at the fees. The other [1280] issues of the case have been tried. There is no harm done.

Objection overruled. Go ahead.

The Witness: I was informed, as I said——

The Court: Is this what you told Mr. Graham?

The Witness: Yes.

The Court: All right.

The Witness: That I was informed that in most cases litigation having been started by Talon, it was always withdrawn at the eleventh hour; that the Talon Corporation did not dare to bring these patents to trial, and that, therefore, in my opinion it was just a matter of treading water and showing up, a willingness to fight, waiting for Talon to come across with some proposition to settle the case.

I have spoken to Mr. Graham in that respect, that our firm is unable to spend large sums of money, and that it would be perhaps much better for us to get out of business the best way we could.

(Testimony of Philip Lipson.)

Mr. Graham told us that he would try to charge us fees that would be nominal.

I heard Mr. Graham state yesterday that he told us that he would charge us about half of the normal fees.

As I recall it correctly, I had told Mr. Graham that we may not even be in a position to pay half of the fees.

He said we would get along.

And these conversations took place in several telephone [1281] calls.

Mr. Graham was recommended to me——

The Court: Don't wander around. Let's get down to the nub of the thing and get this wound up.

The Witness: Mr. Graham had told me, I believe, to send him $400, I believe, as a retainer. I don't recall the exact sum. And I believe that I had sent him either that amount or a little bit less than that. I haven't got my records before me so that I cannot verify those. I would have to bring all of my books here.

The Court: Has that answered your question?

Mr. Graham: Yes.

The Court: All right. Let's go.

Q. (By Mr. Graham): Mr. Lipson, do you recall ever having any discussion with a representative of the plaintiff in this case regarding attorneys' fees?

A. On a number of occasions.

Q. Well, do you recall any particular occasion in 1953? A. Yes. I had a meeting——

(Testimony of Philip Lipson.)

Mr. Leonard Lyon: I think we should identify the parties present, your Honor, before he states what the conversation was.

Q. (By Mr. Graham): Will you state what representative of the plaintiff discussed this matter?

A. Mr. Ralph B. Meech, the secretary of Talon.

Q. Do you recall when that took place in 1953?

A. It was, I believe, in March, I don't know the exact date, and it was in New York City.

Mr. Leonard Lyon: May I ask a voir dire question, your Honor?

Was this a conversation had in the course of an attempt to settle this case, a discussion of settlement?

The Witness: That is correct.

Mr. Leonard Lyon: Then I object to going into the question, your Honor.

The Court: Objection sustained.

Q. (By Mr. Graham): Did you have any discussion with me, Mr. Lipson, in the latter part of 1954 concerning my participation in the trial of this case? A. Yes.

Q. Do you recall when that discussion took place?

A. That discussion took place in either September or October of 1954.

Q. Will you tell the court briefly what that discussion was?

A. I informed Mr. Graham that I had a discussion with Mr. Fulwider, who was local counsel for our firm; that I discussed with him the matter that

(Testimony of Philip Lipson.)

it appeared to me that the Talon Corporation is going to go through with this suit, they are not going to withdraw, and I wanted to know what it would [1283] involve to try this case. Mr. Fulwider informed me that it would involve——

The Court: This is what you told Mr. Graham?

The Witness: Yes, your Honor.

(Continuing) ——that it would involve between thirteen and fifteen thousand dollars. And, furthermore, in view of the financial condition of the defendant, he wanted a $12,000 deposit made in the bank so that he could withdraw sums of money from it as the trial went on.

I informed Mr. Fulwider that I was in no position to deposit $12,000, whether he could take a lesser amount and the balance could be paid out.

He explained to me that he was tied up——

Mr. Leonard Lyon: I object to the conversation with Mr. Fulwider, your Honor.

The Witness: This is what I informed Mr. Graham.

The Court: He said he is relating to Mr. Graham this conversation he had with Mr. Fulwider.

The Witness: That's right, that is the reason that I told Mr. Graham.

Mr. Fulwider had told me that he was tied up with some cases, that it would take him at least two months, possibly more, to acquaint himself with the details of this case, with which he was unacquainted. He only acted as counsel here, as a front, all the material had been sent to him by Mr. Gra-

(Testimony of Philip Lipson.)

ham. [1284] And that Mr. Fulwider had told me that he would have to engage counsel to represent him in the other cases and spend two to three months, plus the cost of the trial, and he explained to me that in addition to that it may cost from a thousand to two thousand dollars to engage patent counsel—patent experts.

I suggested to him that I should be the patent expert. He was against that idea, because of the fact that he thought that I could not act as the defendant and as the patent expert.

I then asked Mr. Graham whether he could come to Los Angeles to try this case.

Mr. Graham told me that his calendar was such that he could not expect to come to Los Angeles in March; that he, likewise, having had expenditures in this case and having carried approximately $10,000 in fees that he did not collect, that he could not very well come to Los Angeles without getting some sums of money, that at least I should raise five or six thousand dollars.

I informed Mr. Graham that I could not raise that money; that the most that I could possibly raise by borrowing is $5,000; that I had endeavored to take a chattel mortgage on the business in order to raise the funds which Mr. Fulwider had asked and I could not raise it.

Mr. Leonard Lyon: This is supposed to be a conversation, as I understand it, with Mr. Graham?

The Court: Yes.

The Witness: That is correct.

(Testimony of Philip Lipson.)

The Court: All this you told Mr. Graham?

The Witness: Yes.

The Court: Let's hurry on to the end of it.

The Witness: Mr. Graham told me that he would try to do the utmost he could, and if possible, if he could get away and I needed him badly, he would come down here; that I would have to pay his expenses.

Mr. Fulwider had asked me to sign—I told that to Mr. Graham—that he had asked me to sign a release in September so that he could file it not later than January 1st.

The Court: For substitution of attorneys?

The Witness: That's right.

I had known Mr. Mockabee—I told Mr. Graham that I had known Mr. Mockabee, because he had filed a patent, an application for a patent for me, and I had gone to Mr. Mockabee and presented this case to him, and he told me that it would involve $5,000 or more, that he did not know the details, that he would have to familiarize himself with it, but Mr. Mockabee was willing to go along and have me pay him out in small installments, and I then informed Mr. Graham at another conversation that I had engaged Mr. Mockabee and that he should send all the material to Mr. Mockabee.

The Court: All right. [1286]

Q. (By Mr. Graham): Mr. Lipson, you recall the trial of this case took place in March of 1955, and that I was here in Los Angeles on several of the trial days. Will you please tell the court

(Testimony of Philip Lipson.)

whether or not I had discussions with you and with Mr. Mockabee during that period while I was in Los Angeles working on the case?

Mr. Leonard Lyon: I have already accepted the witness' transcript of his time in the case. I am not challenging it.

The Court: Just answer yes or no.

The Witness: Yes.

The Court: All right.

Mr. Graham: I think that is all, your Honor.

Mr. Leonard Lyon: I have no questions, Mr. Lipson.

The Court: All right. Step down, Mr. Lipson.

Is that the defendant's showing?

Mr. Graham: That is the defendant's showing, your Honor.

I would just like to state that the defendant would like to have a provision made that if this case is appealed, that some allowance of attorneys' fees to the defendant will be made in connection with the appeal.

Mr. Leonard Lyon: I think that is premature, your Honor, and improper. It couldn't constitute anything but just a threat that the plaintiff shouldn't appeal.

The Court: What is the practice in that? Are those fees fixed by the appellate court? [1287]

Mr. Charles Lyon: Your Honor, I think I could answer that question for you.

In the case of Filtex vs. Atiyeh, I researched the

law, because Judge Tolin awarded attorneys' fees to us there and there was an appeal.

It can be fixed by the appellate court, or this court retains jurisdiction after the mandate, assuming they win the case on appeal, to increase the attorneys' fees to cover a satisfactory fee on appeal.

Mr. Graham: That is what I have in mind.

Mr. Charles Lyon: You don't have to make any order on it now at all. It takes care of itself automatically.

The Court: I would retain jurisdiction to consider the matter, if there was an appeal and a mandate was returned.

Mr. Graham: Thank you.

The Court: How do you propose to proceed, Mr. Lyon?

Mr. Leonard Lyon: If your Honor please, I think I can shorten these proceedings by stating our position, and then if your Honor wants any brief of authority on this digest of the evidence, we will be glad to present it.

It is our position that any award of attorneys' fees at this time to the defendant in excess of $13,500 would be excessive.

The basis for that view and that contention is that that will compensate the defendant for all of the attorneys' fees [1288] that it has paid or owes, and implicit under the award of attorneys' fees it is our position that the court should not and cannot award more than the fees that the defendant has actually incurred.

This is not an award of compensation to the at-

torneys, as your Honor stated, but is an award to the defendant, and an award of attorneys' fees in excess of the attorneys' fees for which the defendant is liable, in our opinion, would be improper and excessive.

If your Honor accepts that proposition, that means that we do not need to go into the reasonableness or the value of the services of the attorneys, and I would very much like to avoid that if I can, because I don't like to be in the position of questioning other attorneys about what they think their services are worth.

I will say this: That we are expressly, on any basis of the award that your Honor may decide is proper, we are expressly conceding the reasonableness of Mr. Kleinman's fee, which has been paid, and we are expressly conceding the reasonableness of Mr. Fulwider's fee, which has been paid. We do not challenge the reasonableness of Mr. Mockabee's $5,000 fee, which is the fee that the testimony shows is to be paid him, and all that is to be paid him under the circumstances here by the defendant.

We do not challenge the reasonableness of Mr. Graham's [1289] per diem rate, but we call attention to the fact that on his testimony he agreed to serve in this case for a half of that fee, and he was to gain anything else out of the recovery in the case, and there is no recovery.

The Court: Now, wait. That was Mr. Mockabee's agreement, but I don't think Mr. Graham had any interest in the recovery at all.

Mr. Graham: I had no contingency arrangement whatsoever regarding recovery.

Mr. Leonard Lyon: I thought it was Mr. Graham.

The Court: Mr. Mockabee had.

Mr. Leonard Lyon: I am sorry about that.

Mr. Mockabee: Your Honor, the contingency was on the basis of any recovery on the part of the defendant.

Mr. Leonard Lyon: Also, it seems to me that in considering Mr. Graham's fee, that if the recovery is to be measured by the time, that allowance should be made for the fact that a substantial amount of his time was devoted to the counterclaim, which certainly has complicated this case, required consideration——

Mr. Graham: If I may interrupt, your Honor. I don't think there is any——

The Court: Just a minute. Let Mr. Lyon finish. Go ahead.

Mr. Leonard Lyon: I think that that should be taken into [1290] consideration, because the counterclaim has not been successful, and we are still being plagued by it and pressed by it in the case.

Also, I think consideration should be given to the fact that Mr. Mockabee's time, at least a very substantial part of his preparation time, was required because Mr. Graham did not continue to conduct the case at the trial, and it required the employment of another lawyer.

I would like to also state one other fact that we

want to call the court's attention to, and that is the statement was made by Mr. Graham, or some other witness maybe, also, that the value of this case involved the future value of the history of the defendant corporation, that the business of the defendant corporation was at stake.

I don't know whether Mr. Graham has overlooked or forgotten, but I think the court will remember that in this case the plaintiff filed an undertaking that if successful it would license the defendant at its established royalty rate. So that the only actual thing in controversy here was whether the defendant should pay that royalty rate.

The Court: The royalty rate might have been the difference between survival or failure, Mr. Lyon.

Mr. Leonard Lyon: It was the royalty rate that the evidence showed was being paid by the other licensees of the plaintiff. [1291]

And I would like your Honor also to have in mind that the four patents that did not go to trial in this case were eliminated from the case by order of November 24, 1952. So there have been no services with reference to those patents since that date.

The Court: What was the date?

Mr. Charles Lyon: Pretrial, November 24, 1952, your Honor.

Mr. Leonard Lyon: 1952.

The Court: And the additional claims were eliminated at that time?

Mr. Charles Lyon: That's right.

Mr. Leonard Lyon: That's right.

Mr. Mockabee: That was three years after the complaint was filed, your Honor.

Mr. Leonard Lyon: I suggested to Mr. Beehler yesterday that there was a practice in this district in fixing attorneys' fees, to fix them on a formula, and I know that the formula is not binding on this particular court even if some other judge in this district follows it, but I thought I would just as an illustration show you where in a recent case that formula has been followed.

That is a decision in this court in Krieger vs. Colby, rendered June 19, 1952, case No. 13202, by Judge Westover. I will read what Judge Westover has to say about this, how he [1292] fixed the fees in that case, because it involves some familiar names.

He says:

"This court has hereinbefore found that the defendants knowingly and deliberately infringed plaintiff's patent. If ever in a patent case attorney fees are to be awarded, they certainly should be awarded in the case at bar.

"Plaintiff was represented by Messrs. Robert W. Fulwider and Harold C. Holland. Mr. Holland filed an affidavit to the effect that he spent three days in the trial of the case, three days in preparation for trial, and three days investigating the facts—a total of nine days. Mr. Fulwider filed a similar affidavit, showing that he spent nine days in the preparation and the trial of the case. As a result, we have a total of 18 days spent by rep-

utable legal practitioners. They assert that a reasonable value for attorneys' fees in this case would be $250 per day. It appears from fee schedules published by various bar associations that a minimum sum to be allowed for attorneys' fees in the trial of a case is $150 per day. It may well be that attorneys in a patent case are entitled to more than counsel handling other [1293] litigation. The court feels that a reasonable amount to be allowed as attorneys' fees in this case for both attorneys involved is the sum of $3,000— or $1,500 each."

That is the exact formula that I was expressing to Mr. Beehler, and I think that practice has been followed in numerous other cases in this court.

If the court wishes to follow that practice in making the award in this case——

The Court: I don't wish to follow that practice.

These bar schedules I am familiar with. They don't mean a thing to me. I don't know that there is any schedule of the L.A. Bar. Are you familiar with one?

Mr. Leonard Lyon: I don't know of any.

The Court: These schedules that he talks about are Inglewood Bar, San Fernando Bar. I know of no schedule by the L.A. Bar.

However, I have fixed patent fees before. I don't know whether you gentlemen, your office, was ever on the receiving end of fees from my court or not. Have you been?

Mr. Leonard Lyon: I don't remember your Honor ever fixing a fee in a case.

The Court: Have you been on the other end when I fixed fees against your client?

Mr. Charles Lyon: No. [1294]

The Court: I have fixed fees, and I have had cases where the showing of what was paid out, in my opinion—where the facts of the particular case seemed to indicate it was more than a reasonable fee, I allowed a fee, I remember, in one case, for less than the amount that was shown to have been expended.

I don't think there is any controlling factor by itself. I think it is a question of the entire facts of the case.

Mr. Leonard Lyon: I think that implicit in awarding an attorneys' fee to a prevailing party is the thought that it is not to be made a windfall or not to be a means of the defendant making a profit on his attorneys' fees. I think implicit in that, in such an award, is that the maximum fee that could be awarded is the amount that the attorneys' fees cost the client.

This is not an award——

The Court: That can't be an absolute rule, either. Because take the case of a contingent fee where the client has no money at all, and the attorney does the work on the prospect of getting a few; if you use that rule in that case, then you would award no attorney's fee. On the other hand, the fact that the attorney works on a contingency

can't be a factor in determining what is a reasonable fee.

Mr. Leonard Lyon: I appreciate that.

The Court: Also, if you had a case where the attorneys [1295] had fixed a definite fixed amount in dollars and cents, it might well be that what was paid or agreed to be paid would be the maximum. The only variation we have from that here is that Mr. Mockabee, of course, had a contingency arrangement of a part of a recovery. Query: Whether the recovery might include what the client got for the attorneys' fees, as well as what he got for the counterclaim.

But in the case of Mr. Graham, as I understand his testimony, his testimony was that he would bill for a minimum fee and would accept this minimum fee, but that he expected a larger fee if he was successful.

I think that might be a fair summary of his testimony.

Now, if that is true, then it is difficult to say absolutely that Mr. Graham's agreement for a certain amount would be the limit of recovery. In other words, you have a point, but I don't think it is absolute in any sense.

Mr. Leonard Lyon: As I understood Mr. Graham's testimony, as he just stated a moment ago, he had no contingency in the lawsuit.

The Court: That is right. He had no contingency, strictly speaking. We all heard his testimony. He would take this amount as a minimum fee. If he was successful, he expected a larger fee.

That is a different thing from a contingency, strictly speaking. [1296]

Mr. Leonard Lyon: Would your Honor want us to brief this subject, or would you want a collection of authorities?

The Court: If you want to file something on it. It isn't going to be difficult for me to decide, but I wouldn't object to a brief.

Mr. Leonard Lyon: If you don't need one, your Honor, I don't want to burden you with one, because this is a matter within your experience.

The most unusual thing about this case is that in the cases with which I have been connected, the attorneys have brought in their audit and their diaries, and their charge transcripts, and the clients have brought in the bills of those attorneys, and the only question has been are those amounts excessive.

Here the client is not content to claim compensation for what he actually owes his attorneys, but he is trying to obtain an award greatly in excess of that amount.

I am making the suggestion that we do not challenge the reasonableness of the facts that these attorneys have brought out about what work they did, and the reasonableness of their rates, but that we do object to an award in excess of those amounts.

The Court: I have your position in mind.

Can we submit the matter, then?

Mr. Leonard Lyon: Yes. [1297]

Mr. Graham: I would just like to answer Mr. Lyon very briefly.

I apologize to the court for answering, because I think most of these things are self-evident and have already been brought out; however, Mr. Lyon made some statements here that I think do require correction.

In the first place, he said that it appeared from my testimony that a substantial amount of my time was spent exclusively on the counterclaim, and I don't think——

The Court: Let's not talk about that. I have my own views about the counterclaim, and my views are that the major fight in this case was over the patents, the time was spent on the patents. The counterclaim showing consisted of a bunch of contracts, which took a little discovery, but was not the intricate part of the case.

It is true that there was some briefing done on the anti-trust problem, which is part of the hours shown on briefing, but the counterclaim problem was not the big part of the case.

Had you got into—which I don't think you could have ever proved, but had you got into the question of trying to prove causation and actual damage, it is true this case might have been much more intricate.

As the matter turned out, in my opinion it was a minor part of the case.

Mr. Graham: And the other thing that is self-evident [1298] your Honor already knows, this undertaking that Mr. Lyon talks about, for the

plaintiff to give the defendant a license even if the plaintiff won the case. That undertaking was filed not on the court house steps but right here in the court during the trial, after all the preparation had been done.

The Court: I understand. That doesn't mean anything to me, either. If the patents aren't valid, why should a man pay any license fee on them? A license fee, a royalty, might be the difference between survival and collapse on the part of a small concern.

Mr. Graham: The last thing, your Honor. If Mr. Lyon's views should be accepted, that the fees to be awarded to the defendant for my services should be limited to bills rendered, I should like to point out that there was no bill rendered for services that I performed after the trial in connection with the briefing.

The Court: I understand.

Mr. Mockabee, do you have something?

Mr. Mockabee: No.

The Court: Is the matter submitted?

Mr. Mockabee: Yes.

Mr. Graham: Yes.

The Court: Before it is submitted, let's do a couple of other things.

These affidavits were filed, Mr. Clerk? [1299]

The Clerk: Yes.

The Court: They will be stricken from the file, and the affidavit of Warren H. F. Schmeiding will be given Exhibit No. BZ, and the record will remain. The objection was sustained to it, but we

will give it an exhibit number for identification only.

(The exhibit referred to was marked as Defendant's Exhibit BZ for identification.)

The Court: The affidavit of Beau will be stricken from the file, the clerk will cancel the filing stamp on it, but it will be given Exhibit No. CA for identification, and the record will remain on that. The objection was sustained to its admission.

(The exhibit deferred to was marked as Defendant's Exhibit CA for identification.)

The Court: And the affidavit of Fulwider will be stricken from the file and be given the identification No. CB for identification, and the record will remain on that. The objection was sustained to Exhibit CB for identification.

(The exhibit referred to was marked as Defendant's Exhibit CB.)

The Court: Now the matter is submitted?

Mr. Mockabee: Yes, sir. I just want to express my appreciation, your Honor, for arranging this time when Mr. Graham was here on the Coast. I didn't realize it was taking [1300] up your vacation.

Mr. Leonard Lyon: I appreciate your Honor taking up your time out of what should be your vacation, sitting here listening to this.

The Court: I am not going to decide it from the bench, because I want to go back and look into it a little further.

I will tell you right now I am not going to allow $40,000. On the other hand, plaintiff's have prac-

tically conceded that it should be $13,500, so I couldn't allow you less than $13,500. But it is not going to be $40,000.

In my own views in these awards of attorneys' fees, you take into consideration the entire case, the difficulty, the problems, the time, the experience and eminence of counsel, the results accomplished. No one factor is decisive. And it is a question of arriving at some reasonable determination.

Nor is the fact that the defendant succeeded indicative of the fact that they should reap a windfall of attorneys' fees which should not be reasonable.

The law has provided that only in certain cases may these attorneys' fees be granted. When they are granted, the law itself says they must be reasonable, which means taking into account all these considerations.

There was a lot of work done on this case. There may have been some duplication. Mr. Mockabee and Mr. Graham worked diligently on it. The court will take into account all [1301] those factors and arrive at some determination.

I want to say one thing more and say it for the record. There always has to be a first time. I never yet have been reversed on the merits of a patent case. That is not bragging. Maybe I have just been lucky. This may be the one. But so far, although I have been reversed on the question of attorneys' fees in two of those cases, every one of my patent cases has been affirmed.

This case can be affirmed on appeal if proper briefs are written, I have no doubt about it. But

unless you write proper briefs, you are going to be in trouble. I am speaking now to the defendants.

The Lyon office writes excellent briefs. They do a good job in their briefing work, and I am familiar with their work and am familiar with their cases that they have tried before me. They probably have tried as many patent cases before me, almost as many as most of the other patent bar put together. They haven't always been successful.

I remember early on the bench here—I went on in '49—I think the first three cases that came up, they lost every case, and I finally said, "I am deciding against you again, but I don't want you to think it is because of the firm that is in the case."

The way they fell I held some patents valid. I think young Mr. Lyon here was the one, or maybe it was Mr. Lyon who [1302] spoke up and said, "We don't like to lose cases, but we are pleased to find a district judge who will hold a patent valid once in a while."

Of course, those were back in the black days when all patents were being struck down. Now things have eased up a little bit.

I have spent a lot of time on these patents. I am convinced that these patents are invalid. Care is going to have to be given to drawing up these findings and drawing up this amended pleading. If this case is properly briefed, you are in, in a breeze, as far as the defendant is concerned. If

it isn't properly briefed, you are going to be in trouble with the Lyon firm, because of the type of work they do.

I realize that Mr. Mockabee is a young lawyer, he doesn't have the facilities or the staff that the Lyon firm has, and I know it is difficult to put out the same type of work that can be done when you have a big staff of experienced men in the background on that work.

I have been favorably impressed with Mr. Graham, but he is a long way off. I trust he will give some assistance in this matter.

Mr. Mockabee: In that respect, Mr. Graham, when will you reach New York again?

Mr. Graham: Not until the 16th of August.

Mr. Mockabee: I wonder if we could have a little more [1303] time on the amended complaint?

Mr. Leonard Lyon: May I make one statement, your Honor?

The Court: On this point?

Mr. Leonard Lyon: I thought you were through.

The Court: He has asked for additional time to file an amendment to conform to proof.

Mr. Leonard Lyon: That is all right with us.

I would like to make this statement, and it can be referred to at any time in the case, or in connection with the fixing of these attorneys' fees, either by the court or by counsel on the other side, and that is that we concede, or do more than concede, we join in the statement that we think the quality of the work that Mr. Mockabee did in this case was excellent, and we are not questioning,

under the factors in the case, that point at all. We are conceding it.

Mr. Mockabee: Thank you very much, Mr. Lyon.

The Court: I think your time runs out about the 20th, is that it? Let's not worry about that. How much time do you want?

Mr. Mockabee: What do you think, Mr. Graham?

The Court: How about September 15th? Is that all right?

Mr. Graham: That would be fine. That applies to the findings, too?

The Court: Yes.

Mr. Leonard Lyon: That would me fine for us, too. [1304]

The Court: That is a Saturday. You had better make it September 14th.

Anyhow, I am merely pointing out what you are going to have to do if you are going to win this case. If it is properly briefed, you have won it. As a matter of fact, the finding of validity and non-infringement, I think, can be sustained. If that is sustained, the court never gets to the alternate ground of unclean hands.

Mr. Mockabee: We are not only going to have to work for a client, but for the record.

The Court: If you falter or stumble, then you are in trouble. I am no oracle, but I tried some cases in this court, and I have sat occasionally on the Circuit, and I know how they approach these things.

Those are my views.

Mr. Mockabee: Yes, sir. Thank you very much, sir.

The Court: Since Mr. Graham is a stranger out here and is going to leave our fair city, I would like to invite all counsel into my colleague's chambers, and we will chat a minute before you go.

Mr. Leonard Lyon: All right, your Honor. [1305]

[Endorsed]: Filed Sept. 6, 1957.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Monday, November 26, 1956, 10 a.m.

(In chambers.)

The Court: I suppose I ought to go over this amendment to conform to proof. Have you both been over that carefully? You filed an answer to it, didn't you on November 1, Mr. Lyon? On October 1 you filed an answer—oh, it's an amended answer, that's right.

Mr. Mockabee, you got an order and you replied to the counter claim heretofore filed, which would be your reply to the counter claim and the amended answer.

You originally sued on about six patents, didn't you, or seven?

Mr. Lyon: Five, wasn't it.

Mr. Mockabee: Six.

The Court: Six. The stipulation eliminated it down to about two.

Mr. Lyon: That's right.

Mr. Mockabee: That's right.

The Court: I notice the answer refers to all of them, but that won't do any harm.

Mr. Lyon: If you are going through the amended answers, the only difference between the first amended answer as originally filed years ago and this new one, I have made notations on it—on page 3 and paragraph 11, sub paragraph B and C are the new matter. [1]

The Court: B and C are new.

Mr. Lyon: That is right.

The Court: Let me look at those.

All right.

Mr. Lyon: Page 4, subparagraph F is the new matter.

The Court: All right.

Mr. Lyon: Nothing new on page 5.

On page 6, about line 14, beginning with the words "defendant has a license under said Silberman patent and plaintiff, as assignee of Silberman, is bound by——

The Court: Down to about 20?

Mr. Lyon: Through "licensee by Silberman" in the third line from the bottom of that paragraph.

The Court: All right, let me look at this.

Now, what's new on page 7?

Mr. Lyon: The last paragraph. That's all.

The Court: Has the counter claim been changed?

Mr. Lyon: No.

Mr. Mockabee: No.

Mr. Lyon: No changes after May 7th.

The Court: Well, you allege estoppel, in connec-

tion with the McKee visit, but you don't sufficiently allege change of position in connection with Silberman. However, since you have alleged estoppel, I suppose change of position would be part of it. [2]

Well, let's look at the findings. Whether you have to retype these or not, I don't know.

But on line 18 and line 19 of your first page you have, in the preamble of the findings, "Order for judgment entered." Now, you're leading with your chin.

Mr. Lyon: I see.

The Court: You have this problem that certain orders made by the court can become a judgment, and I generally say in the memorandum that "Judgment will be entered hereafter." I don't want it "Order for judgment entered." If you retype it, you can strike that out.

Mr. Mockabee: Yes.

The Court: The easiest case I can imagine is this: Where plaintiff sues for money, the court tries the case and decides it and gives the clerk a memorandum for judgment for the defendant and the defendants enter it up. That is liable to be a judgment and his time for appeal is probably going to start from the time the clerk enters it, unless the clerk says the court has decided "Judgment will hereafter be entered." There are some recent cases kicking that around and it is causing some trouble.

Mr. Mockabee: I will retype that.

The Court: I don't know whether you have to retype it. I have crossed it out here. We'll see.

All right, paragraph 5 at page 2, can we get the date of [3] expiration?

Mr. Mockabee: On April 20, 1954 would be the expiration date. The complaint says it was granted April 20, 1937.

Mr. Lyon: Yes, that would be correct.

The Court: Your 17 years runs from the date of granting.

Mr. Mockabee: That's right.

Mr. Lyon: April 20, 1954.

The Court: After the word "expired" insert "on April 20, 1954."

Mr. Lyon: That's fine.

The Court: Somewhere in here I wanted the claims that are in issue. You have very broad findings about these patents. Well, actually, by some pre-trial stipulation only certain claims were in issue.

Mr. Mockabee: Yes, I have a new judgment, your Honor, and I put those in there. I thought I would wait until we went over these this morning.

Mr. Lyon: Well, this new judgment is improper. According to the new rules, I think what your judgment should be is that pursuant to the foregoing findings and conclusions of law it is hereby ordered, adjudged and decreed that the complaint herein be dismissed and the plaintiff take nothing thereby, and that the counter claim be dismissed and the defendant take nothing thereby. This business of reciting all these conclusions of law in the judgment—— [4]

The Court: I haven't looked at it yet, but the

new rule hasn't changed anything except to require everything under one document. But that can be waived. In other words, if you get findings and conclusions in one document, you can still sign up a separate document. The judge can waive that rule. But we have a new rule for the drawing up in one document of findings, conclusions and judgment but your judgment should still be the same kind of judgment you previously used.

Mr. Mockabee: I think Mr. Lyon has the original.

The Court: We have a pre-trial stipulation in here, don't we, that sets forth the claims in issue?

Mr. Mockabee: They are in that judgment, your Honor.

The Court: Did you check it?

Mr. Mockabee: Yes, against the stipulation. Here it is, your Honor.

The Court: All right. Well, I don't know whether it can be inserted in here or not, or whether it has to be redrawn.

Mr. Mockabee: Your Honor, I can redraft this and make the judgment and conclusions all in one document, so we will have it according to the rule.

The Court: Then at the end of paragraph 3, on jurisdiction, insert a finding that by stipulation the patents in issue and the claims of each patent and so forth are——

Will that be satisfactory, Mr. Lyon? [5]

Mr. Lyon: Yes, your Honor.

The Court: Then on 6, probably should list the claims 1, 2, 14, 16 and 17 of the approved patent.

And then again in 8, list the claims of the personal patent—9 claims.

Mr. Mockabee: Well, would that apply to 8, your Honor, where we are talking about what the disclosure taught?

The Court: It is not important as to 8; 8 could be left general.

I think in 9, the claims ought to be in there.

Mr. Mockabee: Yes.

Mr. Lyon: In 10, too.

The Court: And the claims ought to be in 10.

Now, on 11, list the claims of Silberman. You will probably have to by reference, at least, put it also in the second sentence; in the device of the Silberman patent shown by said claims.

Mr. Lyon: Which one are you on now?

The Court: I'm still on 11. There are two sentences there, and you list the claims to start with, and then you say: * * * In the device of the Silberman patent shown by said claims, is not a new combination of elements.

Now, on 12 you will have to list—you may be able to do it by reference by saying "the claims in issue" each time. [6] You don't have to list them each time. But again, disclosure in the claims in issue (Silberman)——

Now Plaintiffs' Exhibit 5 was the claimed infringed device, was it not?

Mr. Lyon: No, that was the machine we bought.

Mr. Mockabee: Plaintiff's commercial structure of the Silberman patent.

The Court: Well, the machine was supposed to illustrate——

Mr. Lyon: It was what we claim we made under the patents.

The Court: It was the alleged infringed device?

Mr. Lyon: That would be the defendant's machine; that would be the infringing device.

The Court: I didn't say "infringing": I say the device that was infringed.

Mr. Lyon: Yes.

The Court: Again, in 13 you have this matter of claims again. In other words, this has to be limited to the claims in issue. You can't have a finding on claims which were never tried.

At the top of page 4, first line, after the word "report," insert "to his company," and on the second line, after the word "but" insert "he."

Now, I don't know that this is clear: "made oral statements to the contrary." By "the contrary" you mean he told [7] the president of the defendant that it did infringe?

Mr. Mockabee: No; made oral statements to the effect that there was no infringement.

The Court: All right, strike out "to the contrary"; "made oral statements to the president of the defendant," insert something to the effect that there was no infringement by the defendant in the machines that he was operating.

Mr. Lyon: I certainly don't know of any evidence in the record that would support the last sentence in paragraph 15.

The Court: Well, I think that is a fair inference from all the facts.

Mr. Lyon: We bought that patent to suppress Silberman to keep him from manufacturing these machines for the industry at large.

The Court: Well, that matter was but an inference. He could have had it for other purposes.

Now, on 16, elements of the Silberman '793, the 17 elements of the claims in issue in Poux.

Now, what is this admission of plaintiff's expert regarding the showing in Johnson '667?

Mr. Mockabee: You made reference to that in your memorandum, your Honor, as I recall it. He was cross examined with regard to the showings on the chart relative to the Johnson patent, and he admitted that where he had stated [8] Johnson did not show elements of the Poux. Actually, certain elements were shown.

The Court: While you are redrawing, you had better put the full elements of the Poux patent in.

Mr. Mockabee: All right.

The Court: And again, everything in the claims in issue in the Poux patent.

Put in the full number of Smith.

The alleged method of the claims in issue in Poux.

In 19 you have the same problem. Maybe you can correct it merely by the insertion of "claims in issue" in the last line.

You have the same problem in 20.

Actually, 22 is more of a conclusion than a finding of fact. The Circuit will or will not be struck

by that, depending on how they feel. Sometimes they will write and say to separate your findings and conclusions, and other times they will never raise it. But the better practice is to try to segregate your facts.

Mr. Mockabee: Well, I treated that, your Honor, as being a fact that was found on the basis of the testimony of the witness Lipson.

The Court: Well, I will leave it, except for that change of position; add to that "expended money, [9] expanded facilities," or whatever the problem is there. That is a factual matter.

Mr. Mockabee: Yes.

The Court: And then, of course, the conclusion is the fact of license and estoppel.

Again, you have "expanded facilities"; that is probably enough there, in that 13.

Mr. Mockabee: Do you want to leave that in 23, your Honor?

The Court: Yes, that is all right. I just wonder whether it goes far enough. It probably does—expended money.

In 26 you have to have claims in issue.

In 29, the mere fact that you find that plaintiff's witnesses testified is not a finding of that fact. Strike out "Plaintiff's witnesses testified."

Now, on 30, what you have got there in part is a conclusion of law that the contract was illegal. You should expand that out. I don't think there is too much harm in having some conclusions creep into the findings, if you have the findings of fact. As I

recall, that particular contract was one for dividing up the market, was it not?

Mr. Mockabee: Was that the American agreement? I have forgotten now.

The Court: AH—do you remember?

Mr. Mockabee: Where they settled the suit; told them to [10] keep it pending as long as possible?

The Court: No, that is not that one. AH, I think, is the earliest.

Mr. Mockabee: Restricted the quota?

The Court: I was looking for my memorandum. Here it is.

Mr. Mockabee: Page 13, the last paragraph.

The Court: Well, I would have to see the agreement, but as I recall it was the one in which it divided markets or allocated territory.

Mr. Lyon: It didn't allocate any territory.

The Court: Well, it divided markets. Do you have a copy of this?

Mr. Mockabee: No, I don't. It contained restricted licensing provisions.

The Court: There is one of them where Talon collected royalties on everything that Silberman would buy. But that is another one that was clearly illegal. That was Exhibit 7; "Cap-Tin agrees that all quantities of fasteners or fastener chain which it may acquire from others and resell shall be included along with fasteners made by machinery licensed in computing the royalties to be paid." There clearly was a contract causing Cap-Tin to pay on unpatented articles.

But that is not the one I am thinking about.

Mr. Lyon: What is illegal about that?

The Court: To make a man pay royalty on unpatented [11] material?

Mr. Lyon: Yes. You can measure your royalties on anything. You can make an agreement to pay royalties forever.

The Court: Sure, but you can't say to a man pay royalties on all zip chains you make on these machines and also pay us royalties on all zip chains made by others, regardless whether they are made by us or not. That is clearly tying in unpatented matters with patented. You can't do that, any more than you can say pay royalties on what you make here and also you have to pay royalties on——

Mr. Lyon: It is quite common to write a license agreement which says that licensee will pay royalties on all of the automobiles he manufactures whether or not they come under any of the patents.

The Court: Well, that is different. That might possibly be all right. But here were things that he was not manufacturing; he was buying from someone else.

Now, that is not AH. Look over AH and I think you will find that it divided up markets or assigned territory. Get the facts on that and then we can define the legality.

In 34 you say that the licensees of Talon didn't pay royalties to plaintiff. Some of them did, didn't they?

Mr. Mockabee: Yes. Shouldn't we properly say "while some licensees * * *"?

The Court: And in no case did plaintiff pay roy-

alties [12] —I think in some cases the licensees paid nothing and in some they did—but in no case did Talon pay any royalties. I don't know that I get the 'therefor." Did I say that in my memorandum that of that alone the net result was the curtailment of production of all such licensees?

Mr. Mockabee: I think that's it. I will have to find it. I don't think that is your wording, your Honor. I think I put that in there. That was a net result of all those licensees that had the restricted provisions in them.

The Court: Well, it's all right if it is based upon everything, but not upon the mere facts found on this one paragraph. You had better separate that and make it a separate paragraph and tie it in with the works and not with this one business.

Mr. Mockabee: Yes.

The Court: Now, in 38, on page 7, you say "if the licensee exceeded his quota of production provided for." You ought to look it up again. That may be true. It seldom had a quota free. Well, I don't remember the number. I have circled here the word "if."

Mr. Lyon: Which one?

The Court: 37 on page 7, lines 18 to 21. It is hard to remember for sure if there was a quota free limitation on that.

Mr. Mockabee: In your memorandum, your Honor; Exhibit [13] 7, the first Silberman contract of July 16, 1945, is particularly offensive. It continued until cancelled by Exhibit 8, the second Silberman contract of April 18, 1949. In paragraph

5(a) Cap-Tin (Silberman) agreed to pay 10% royalty on all slide fasteners "made by the use of any machine or processes" covered by the patents in excess of——

Yes, well that's all right.

In 43, there I suppose you need not particularize the claims because they never brought either Poux or Silberman to issue in any of the claims.

Now, you have objected to 46, haven't you?

Mr. Lyon: Right.

The Court: What's wrong with that?

Mr. Lyon: There is no evidence of any communication whatsoever from McKee to any of the engineering personnel of the plaintiff. The only evidence of any communication at all is that letter that is in evidence, and it doesn't refer to any machinery or patent.

The Court: That is true, there is no evidence. But when the device that Talon brought out has some of the various things in it that Silberman-Lipson had, and Lipson himself testified to that effect from his knowledge of the industry that they borrowed from, I think I can make that finding.

Mr. Lyon: I don't think it is an issue, but if we can [14] try that issue we can show each one of those things is old art long prior to the time Lipson engaged in the zipper industry.

Mr. Mockabee: I think Lipson testified to a number of these different improvements, the reason why he made them, the fact that he made them of his own knowledge, and there is no refutation of it by the plaintiff.

The Court: I'm going to leave it as it is. I will overrule the plaintiff's objections.

Mr. Lyon: How about the objection to the failure to find on the counter claim?

The Court: I haven't got to that yet.

On page 10, I think I would say "which is considered remote." I don't want to insult the Circuit. They may not think it is remote. Strike out "which is completely remote."

Mr. Mockabee: All right sir.

The Court: Now, there definitely has to be findings of the counter claim. It was tried on the merits.

Mr. Lyon: On my objections before you, your Honor.

The Court: Yes.

Mr. Lyon: I think it can be certainly found, in accordance with my suggested finding 49, that none of the acts of the plaintiff herein constituting a violation of the anti-trust laws of the United States—quoting from our proposed [15] objection: "Failure to find that none of the acts of the plaintiff found herein to constitute a violation of the anti-trust laws of the United States has caused injury to the defendant in its business or property."

Mr. Mockabee: Your Honor, I don't believe that that was the way you found it. In the judgment I have just presented here, at page 3: That the court holds that the counterclaim of defendant be dismissed on the ground that the acts of plaintiff constituting a violation of the antitrust lacks sufficient cause or relationship to any damages which plain-

tiff suffered as a result of said actions of plaintiff." I think Mr. Lyon's proposal is considerably broader than the court found.

The Court: Well, that raises the question whether public injury is enough, without private injury, to use the antitrust laws as a defense. That is the issue.

Mr. Lyon: I think your Honor knows that you don't even see a cause of action, or a private cause of action, for violation of the antitrust laws, unless you allege, and of course you don't prove a cause of action unless you prove it.

The Court: I think 49 is a correct statement. In other words, there is no causal connection between 7 and AII and those various exhibits. The only causal connection could have been a conference in Los Angeles, and the introduction of the cheap zipper when they couldn't secure an agreement on [16] prices. I would be willing to limit it that none of the contracts of the plaintiff * * *

That is true, there could be some injury flowing from the Los Angeles situation, but that plaintiff's proof failed as to damages.

Mr. Lyon: You mean defendant's.

The Court: That defendant's proof failed as to damages. But I wouldn't want to say there was not any damage coming out of that.

Mr. Mockabee: The way I would set it up in the judgment, it would say: The acts of the plaintiff constituting violation of the antitrust laws which would be the contracts of the price fixing meeting,

or the filing of the suit against the defendant or all of them.

Mr. Lyon: Well, suppose we take it the way I have it: That none of the acts found herein constituting a violation of the antitrust laws of the United States have been shown to have caused injury.

The Court: No. I'm going to give what you have, with that exception on it. Is there any other thing besides the Los Angeles meeting?

Mr. Mockabee: Well, our position was, under Cox versus Dempsey, that the filing of the suit was another step in the scheme—the contracts, the sales meeting, the filing of the suit primarily. [17]

Mr. Lyon: Of course, our position in that regard is that there is no proof that this filing of the suit was so litigated in the first place; and in the second place, Kobe versus Dempsey has been very strongly criticized on that very point. Just last week Judge Tolin refused to follow it in dismissing a counter claim under exactly the same circumstances in a case I tried between the Stauffer and the Slenderella systems.

The Court: Well, word it this way: Take the first two lines of this 49, that none of the acts of the plaintiff found herein to constitute a violation of the antitrust laws of the United States, except the meeting in Los Angeles, the acts and conduct of the meeting in Los Angeles — I'm only stating it roughly—referred to in paragraph 3 of the findings, and the filing and prosecution of this law suit, has

caused injury to the defendant in its business. Put the exception in there.

Now, on your counter claim, are you content merely with the one finding? You don't propose any findings on that counter claim?

Mr. Lyon: Just that finding, that none of the acts * * *, and then I want the conclusion of law to the effect that they haven't proved damage.

The Court: Well, then, take 49 as we have it, and then put another finding of fact in—how do you want to word it? [18] —The fact that the plaintiff's proof on the counter claim failed to prove any causal connection between the alleged——

Mr. Lyon: Well, I have it worded in proposed conclusion of law.

The Court: Well, let's get a finding. It would be something like this: That plaintiff's proof on its counterclaim fails in that there was proved no causal connection between the alleged damage to the defendant and the acts of the plaintiff.

Mr. Lyon: That's fine.

The Court: Have you got that?

Mr. Mockabee: Yes.

Mr. Lyon: I'm going to get a copy of the transcript.

The Court: Will you let him use it to work these findings up?

Mr. Lyon: Sure.

Mr. Mockabee: Thank you.

The Court: I am making that exception on your 49. But even if it were true that there may have been something about the suit and the Los Angeles

meeting, still there was no causal connection proved between the alleged damage to the defendant and the acts of the plaintiff.

Mr. Lyon: That is a conclusion of law or a finding of fact, and I think we ought to put it in both places.

The Court: Well, I wanted it in both places, too. [19] Let's see what we have on the conclusion of law. Before we go into that, however, do you have any objection? Do you want any more specific findings on these patents that have been made?

Mr. Lyon: I have no suggestions to make.

The Court: I take it by that you're content with them; not content with my decision, but you're content with the findings?

Mr. Lyon: No, I won't say that.

The Court: Then in what regard do you want the findings changed?

Mr. Lyon: I don't want them changed. I want them just the way they are, but I'm going to argue to the Court of Appeals that they are wholly inadequate to support the decision.

The Court: In other words, what you want there, according to your language, is to create error in this Court so you can take advantage of it in the Court of Appeals.

Mr. Lyon: It is my understanding of the recent decisions of the Court of Appeals in patent cases that you don't do the Court of Appeals any good unless you tell them what the device is. Anyways these findings wouldn't even tell the Court of Appeals what the machinery is supposed to be all

about, and wherein you find in the prior art this element and that element and so on of the device. It is my understanding that [20] a proper finding would analyze the Poux patent and say what it does. You say that it won't operate, but you don't say why. It is not my business to erect the findings for the defendant, and I think I am entitled to permit the findings to be entered without objection, even though I feel that they won't hold up.

The Court: I want to find out whether you are just objecting to my decision or objecting to the form of these findings. If you are objecting to the form of these findings, then let's find out what those objections are.

Mr. Lyon: I don't object to any of these findings, except the ones I have raised that objection to as not being in accordance with your decision.

The Court: You don't object to any of these findings—say that again.

Mr. Lyon: In other words, it is the province of the attorney in preparing findings to prepare findings in accordance with the court's decision. These findings that Mr. Mockabee has presented are in accordance with your decision.

The Court: Then you are objecting to my decision on the fact that Poux machine wouldn't work and on the fact that there is no infringement of the Silberman and the various other findings, and not to the form of these findings. If you are objecting to my decision on these ultimate objections, that is one thing. If you are going to raise in the Circuit [21] questions as to the sufficiency of the findings,

then I think you should particularize them here. I think you should have done it in writing at the time the matter came to this court. I set aside a morning to settle findings, and your objections, outside of objecting to my decision, are limited to one or two rather specific matters. I'm not going to tell you that you can't, but if you're going to object I want you to object. I, personally, feel that the findings would be better if they were more detailed. But I want you to make your position clear at this time.

Mr. Lyon: I certainly wouldn't propose, for instance, that the court make a finding that the Poux patent was invalid in that it disclosed a machine in which the die and the punch were in the reverse position in order to be operative—I wouldn't suggest that, because I don't believe that is an adequate ground for holding the patent invalid. But I think you do, and if you're going to find it invalid on that ground you ought to say so.

The Court: Well, I think you should then particularize your findings. We are going to have to go back all over this thing and do some work on it, Mr. Mockabee. You'll have to take these general statements you have about the failure of the Poux to work, tell why it won't work in your findings, take your general findings that all the elements found in Silberman were old in the art and list where they are. You can [22] do that with all of these things. I think that is the practice and I think, as Mr. Lyon says, it at least gives the Circuit more help.

Of course, I'm not excusing Mr. Lyon from not objecting to the generality of your findings.

Mr. Mockabee: Well, your Honor, I was trying to follow it as closely as I could what you had in your memorandum.

The Court: Well, a memorandum is not findings. If it had been sufficient for findings, I would have said "Let this be the findings." You should follow the ultimate findings of the court, but you should draw your specific findings of fact in sufficient detail to support those general statements that appear in the memorandum.

Now, this is quite a job.

Mr. Mockabee: I will be glad to do it, your Honor.

The Court: But as I told you before, if this case is properly handled you can win it on appeal.

Mr. Mockabee: I will be glad to amplify it.

The Court: The first step is to get proper findings and conclusions and judgment. If it is properly briefed, this case can be won. But if it is not, the Lyon office will run over this like a steamroller. I have nothing against the Lyon office.

As a matter of fact, you won a pretty good case in my court on the airplane. You didn't have much trouble with that. [23] But I don't always see with you eye to eye. In fact, they didn't even appeal, did they?

Mr. Lyon: No.

The Court: I heard later that the poor guy had a heart attack.

Mr. Lyon: It was not a heart attack. It was a mental——

The Court: Breakdown?

Mr. Lyon: ——a nervous disorder.

The Court: Nothing to reflect on the Lyon firm. They do an excellent job. But the point is this. I have slept with this case and I did a lot of work on it and I think it can be won if it is properly handled. If you miss any bets you're going to be in trouble.

So let's get some more done on particularizing those findings. I can tell you generally what they are.

I don't know that 4 has to be particularized.

No. 6 ought to be.

And possibly 7.

8 ought to be a little more particular.

And certainly 9 should be.

10, invalid by prior disclosure—that should be particularized.

11 should be—Silberman contained all elements.

On 12, you have it that you have to prevent the zippers bunching up, but there probably should be descriptive matter [24] on the other ones. In other words, this V-shaped ram, as I remember, there was evidence that that V-shaped ram would not operate at high speeds.

Mr. Mockabee: Yes sir.

The Court: I don't remember now the function of the spring bars on top, but the V-shaped ram D was a very important point in the case, because the Silberman patent had a V-shaped ram, didn't it?

Mr. Mockabee: The spring bars were put in place on a V-shaped ram in exhibit 5.

The Court: 12—13—certainly 14.

Now, you have to do that.

Mr. Mockabee: Yes, your Honor.

The Court: I didn't look through the rest of this, but most of it is right in there.

All right, conclusions of law. Again, you will have to put in the claims and your conclusions don't have to be as specific as the findings.

If you have your findings on this prior art, and your findings did not teach a new method, then your conclusion on number 1 is correct. Do you make the finding that Silberman '793 never operated? If you didn't, there should be one.

Mr. Mockabee: I will check that.

The Court: Because you have it in your conclusions. It is all right to have it in both places. [25]

Mr. Lyon: What is the evidence that shows that——

The Court: Lipson. Well, I think there was various evidence that showed that '793, as such, was never operated. There was one witness that, I think, so testified, but I didn't credit him.

Mr. Mockabee: I don't think he went into any detail as to what machine it was that operated, whether it was a machine like Exhibit 5 or a machine that was patented.

The Court: Well, in making that finding, you probably should state that the court does not credit the testimony of witnesses that '793 operated. I don't think it ever did. Somebody testified that it did. I don't remember who it was now.

Mr. Lyon: There was a bunch of machines down in Mexico that were built by Silberman.

Mr. Mockabee: The plaintiff said that Exhibit 5 was a Silberman machine, and the testimony with regard to some of these other machines doesn't say what machine it was, whether it was that Exhibit 5 type or a '793.

The Court: Well, on conclusion No. 4: Plaintiff purchased '793 subject to existing license from Silberman—that probably is all right as far as it goes, but you ought to have another conclusion of estoppel based both upon Silberman's contract with them and McKee's contract, and that the expenditure money and expanded facilities—you have [26] findings on that, or will have—and that by reason of that there is an estoppel.

Mr. Lyon: He has that in No. 6.

The Court: Is that in 6? Well, then the first line of 6 should be a separate conclusion and the second part of 6: Plaintiff's officer's (McKee's) report that there was no infringement created estoppel—that's not correct. The mere report that there was no infringement doesn't create an estoppel. It is reliance upon his statement. That one on estoppel should be broadened to include the reliance upon Silberman's statement, the reliance on McKee's statement; and in each case the expenditure of money, the expanding of facilities and change of position is what creates the estoppel.

On 7, the license agreements, instead of "agreement," you refer to, either add to 7 or add another conclusion of law, that the plaintiff is, by reason thereof, not entitled to maintain this action for patent infringement.

In the case of your defense of misuse of patents, unclean hands and all prevents plaintiff from recovering on a patent, even if the patent is good and valid and infringed—as a matter of fact, that should be an alternate finding to the effect that even if the claims were good, were valid and were infringed, alternately, that the plaintiffs cannot recover because and so forth.

I don't think No. 8 should be limited to that instance [27] in Los Angeles alone; plaintiff's attempts and so forth in connection with its contracts, conduct and so forth, as found herein.

Well, you have a lot of that in here.

Mr. Mockabee: Yes, further on.

The Court: But 8 shouldn't be there standing alone. I don't know if that's true.

Mr. Mockabee: I have that set forth as a separate conclusion, based upon that one meeting and what they tried to do.

The Court: Well, I want it all tied in together.

Mr. Mockabee: I have a note here for that.

The Court: Now 14 is all right, but you have to go back and check to see whether you have findings of interstate commerce. I suppose there are. You have those findings of 70% and 30%.

Mr. Mockabee: I will make a note to check that.

The Court: You have to have your finding to support that conclusion.

Now, what other conclusions did you want, Mr. Lyon?

Mr. Lyon: I propose a conclusion that——

The Court: What you have got as to 16 here?

Mr. Lyon: That is right.

The Court: All right, put 16 in as a conclusion.

Mr. Lyon: Make a note of that, Mr. Mockabee.

Mr. Mockabee: Yes. [28]

The Court: Now, let's look at the judgment.

Mr. Lyon: Why wouldn't a proper judgment be simply that in view of the foregoing findings of fact and conclusions of law, it is hereby ordered that the complaint herein be dismissed and that the plaintiff take nothing thereby and that the counterclaim herein be dismissed and that the counterclaimant or defendant take nothing thereby. Why recite all these conclusions of law as set forth in the judgment?

The Court: I think if I were drawing the judgment, I would take your 2 and 3—use Findings of Fact, Conclusions of Law, and then Judgment—based upon the findings of fact and conclusions of law, it is hereby adjudged that Claims 1 to 4 and 16 to 17 of the letters patent and so forth are invalid and void and not infringed by the defendant, and that the plaintiff take nothing and the complaint be dismissed.

Add another paragraph: It is adjudged that the defendant take nothing on its counterclaim, and that the complaint be dismissed.

That's your judgment.

And also another paragraph that defendant have and recover from the plaintiff the sum of twenty thousand dollars in attorney fees and its costs and blank them out and that is your judgment.

Is there any objection to that? That's all it takes.

Mr. Mockabee: No. [29]

The Court: The net result of all this, Mr. Clerk, is this: The court directs that the findings of fact, conclusions of law and judgment be redrawn. [30]

[Endorsed]: Filed Sept. 6, 1957.

PLAINTIFF'S EXHIBIT No. 6

[Title of District Court and Cause.]

DEPOSITION OF PHILIP LIPSON

Deposition of Philip Lipson, taken on behalf of plaintiff at the Offices of Lyon & Lyon, 811 West 7th Street, Los Angeles, California, commencing at 10:00 o'clock a.m., March 18, 1952, before W. E. McClure, a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed notice and oral stipulation.

Appearances of Counsel: Evans & McCoy, Ralph E. Meech and Lyon & Lyon, Esqs., by Charles G. Lyon, Esq., and William A. Doble, Esq., for plaintiff. Solomon, Kleinman and Fulwider, Mattingly & Babcock, Esqs., by Robert W. Fulwider, Esq., for defendant. [1*]

Mr. Lyon: This deposition is taken according to a notice, the original of which I hand to the re-

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* Page numbers appearing at top of page of Original Deposition.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

porter, and it is noted that it was originally scheduled for the 7th day of March, 1952. May it be stipulated it has been regularly continued by oral stipulation to today?

Mr. Fulwider: Yes.

PHILIP LIPSON

having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Lyon): Mr. Lipson, will you please state your full name? A. Philip Lipson.

Q. Do you understand the nature of the proceedings that are going forward here this morning?

A. Not quite.

Q. Pardon?

A. I am not quite sure about it.

Q. You have never given a deposition before?

A. No.

Q. Well, I will inform you, and your attorney can correct me if I am in any wise in error, that you are called [2] here to testify under oath in answer to questions as I propound them. Your answers will be taken down by the court reporter, and you will be given a chance to read them over and make any corrections that you deem required. You will then sign the deposition, and it will be filed as part of the permanent records of this Court, I mean of the Court at this trial. You are called as an adverse witness, that is, as the Presi-

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

dent of the defendant corporation. I am calling you not as my witness, but as if you were in court on cross-examination. You, of course, will answer the questions fully and truthfully, and you have an opportunity to have your own attorney instruct you not to answer any question that he deems is improper.

Where do you reside, Mr. Lipson?

A. 3206 Rowena, Apartment 4.

Q. What is your present occupation?

A. Manufacturer.

Q. Are you the President of the Union Slide Fastener Company? A. Correct.

Q. Where is that business located?

A. At 1829 Blake Avenue.

Q. How long has that business been located at Blake Avenue? A. Since July, 1950.

Q. Was it previously located on Chandler Boulevard? [3] A. Yes.

Q. What was that address?

A. I believe it is 10731.

Q. When was the Union Slide Fastener Corporation organized, do you know?

A. I was not a member of the corporation when it was incorporated. I believe it was in March, 1947, some time in March.

Q. Do you know who organized that corporation? A. Yes.

Q. Was it Sigmund Loew?

A. Sigmund Loew, I believe so, because I wasn't

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

President at the time. I think he was one of the charter members.

Q. How long have you been associated with the Union Slide Fastener Company?

A. Since June, 1947.

Q. Who was associated with the company at the time you joined it?

A. Sigmund Loew, his wife Regina Loew and Louis La Med. Do you mean the officers, who were the officers?

Q. That is correct? A. Yes, Louis La Med.

Q. How do you spell that last name?

A. L-a-M-e-d.

Q. Was Morris Waldman associated with the company at [4] that time?

A. Not to my knowledge.

Q. Was he working there?

A. I have seen him there once when I was at the factory prior to my entry. When I got in there he wasn't there.

Q. Isn't it a fact, Mr. Lipson, that at the time you joined the Union Slide Fastener Mr. Waldman was working for the company? A. No.

Q. Isn't it a fact that shortly after you became associated with the Union Slide Fastener Company at your request Mr. Loew terminated Mr. Waldman's employment by the Union Slide Fastener? A. No.

Q. What was your previous occupation before

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

becoming a member of the Union Slide Fastener Corporation? A. I was semi-retired.

Q. Had you engaged in the manufacture of slide fasteners prior to becoming associated with the Union Slide Fastener Company? A. No.

Q. Will you give me the names of the present officers of the Union Slide Fastener Corporation.

A. Well, myself, I am President, Philip Lipson, President, Herbert J. Lipson, Vice-President. [5]

Q. What, if any, relation to you is he?

A. My son, and Edith Lipson, Secretary-Treasurer. Edith Lipson is my wife.

Q. Are those all of the officers you have just named? A. Yes, sir, right.

Q. Are they also the sole shareholders of the corporation? A. Yes.

Q. Mr. Waldman does not hold an office in the corporation? A. No.

Q. He holds no shares of stock in the corporation? A. No.

Q. What is his function at the corporation at present?

A. He is a foreman of the production, for the zipper production.

Q. Do you have any other employees that have a supervisory capacity? A. Yes.

Q. Who are they?

A. In my machine shop I have a man, Fred Taberlet.

Q. Does your company, that is, Union Slide

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Fastener Company, employ machines for manufacturing slide fastener stringers, namely, chain machines, as they are known in the trade?

A. You mean—what do you mean by "employ?"

Q. Use. A. Whether we use? Yes.

Q. At the present time are your machines of that type single or double-head machines?

A. Double-head machines.

Q. At any time during the time you were associated with the company did they have the single-head machines?

A. They had, and they still have them, but they were not in use.

Q. Now, referring to the double-head machines, who designed those machines?

A. I don't know.

Q. Who built the machines?

A. I also don't know.

Q. Were they built while you were there?

A. No.

Q. Now, may the——

A. I want to ask you a question. When you say "they were built," the original machine was already built when I joined the company.

Q. But subsequently other machines were built?

A. Correct.

Q. And you built them; isn't that rgiht?

A. That's right.

Q. We have supplied to you prior to the taking of this deposition a blueprint. I will show you a

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

blue line [7] print, and ask you if you recognize this as a copy of the drawing which was given to you to study approximately a week or ten days ago?

A. No, I didn't receive one a week or ten days ago.

Mr. Fulwider: It was authorized then. We got a print I think about Thursday, and I finally gave it to him yesterday.

Q. (By Mr. Lyon): I will ask you then if you recognize it as a print, a copy of which was given to you yesterday or some time previous to today?

A. I recognize it as a print, but whether it is an exact copy or another one, I don't know. It looks similar, but whether it is the same, I don't know, similar to the one that I was studying. I only looked at it yesterday.

Q. You have had a chance to study a print that generally resembles this print; is that correct?

Mr. Fulwider: I will say, Mr. Lyon, if you will state for the record that it is a duplicate we will so stipulate.

Mr. Lyon: It is a blue line print of the same drawing.

The Witness: Whether the details are the same I can't tell at a glance. I mean it looks like the one that I studied.

Q. (By Mr. Lyon): Now, Mr. Lipson, some time in September of 1951, I believe it was, do you recall a visit that was made at the plant of the

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Union Slide Fastener in Los Angeles, [8] at which time there was present Mr. Ward Robinson, Mr. Ralph Meech, both of the Talon Company, myself, Mr. William Doble, who is present here in the room, and Mr. Jim Oswald, together with a photographer?

A. Yes, it was some time in September.

Q. That is right. At that time you showed to us, did you not, a number of blueprints which you had in your possession. A. Yes.

Q. Later you supplied copies of those blueprints to me, did you not? A. I did.

Q. At that time did you tell me that those were the blueprints which represented the parts and the assembly of the double-headed zipper machines which you were using at the Union Slide Fastener?

A. No, only some of them. I said some of them were obsolete, and I didn't have newer drawings.

Mr. Lyon: I will show you a roll of blueprints, and I will ask the Notary if he will mark this one as Plaintiff's Exhibit 1.

(Blueprint referred to was marked by the Notary Public as Plaintiff's Exhibit 1, and is hereto attached.)

Q. (By Mr. Lyon): I ask you if you recognize this as one of the blueprints originating with your company which you [9] gave to me as a result of that inspection of your plant?

A. I believe so.

Q. Will you tell me what is shown on that blue-

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

print, and whether or not it shows the parts of the zipper-making machines as in use at the Union Slide Fastener? A. Not all of them.

Q. It shows some of them, however; is that correct?

A. It shows some, because changes were made after that. This is a blueprint that was made by one of our employees, and he was not a professional draftsman. He did the best he could—there are a lot of errors in this blueprint. When I gave it to you I stated so.

Q. Well, I note a date on it 12/28/48.

A. Yes.

Q. As of that date, which I take it to be the 28th day of December, 1948, did the machines at Union Slide Fastener generally correspond with the parts shown on this drawing, Exhibit 1?

A. I wouldn't know offhand unless I studied it, because this blueprint was not made under my supervision. It was done by an inexperienced draftsman.

Q. I show you another print entitled "Main Housing Assembly," and it bears the date "6/20/50, drawn by J. H. P., checked by P. Lipson." That would be you? A. Yes.

Q. I ask you if you can identify that print as one [10] of the prints you gave to me.

A. Yes.

Q. Does that print accurately show the main

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

housing assembly of the zipper machines as employed by Union Slide Fastener?

Mr. Fulwider: Has it been marked Exhibit 2?

Mr. Lyon: I will have it marked. We will offer that print, and the first one will be offered in evidence as Plaintiff's Exhibit 1 to these depositions, and the second one as Plaintiff's Exhibit 2.

(Blueprint last referred to was marked by the Notary Public as Plaintiff's Exhibit 2, and is hereto attached.)

Q. (By Mr. Lyon): I will show you another blueprint entitled "Left End Assembly," dated "6/22/50, drawn by J. H. P., checked by P. Lipson," which I presume is yourself; is that correct?

A. Yes, sir.

Q. I ask you if you recognize that as one of the prints you gave me, and does that correctly illustrate the left end assembly of the slide fastener machines as employed at that date by the Union Slide Fastener?

A. Yes, there is a resemblance.

Q. By "that date" I mean June 22nd, 1950.

A. Yes.

Mr. Lyon: That print, as identified by the witness, [11] will be offered as Plaintiff's Exhibit 3 to these depositions.

(Print referred to was marked by the Notary Public as Plaintiff's Exhibit 3, and is hereto attached.)

Q. (By Mr. Lyon): I show you another print

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

entitled "Union Slide Fastener, Inc., No. 11-3 Shearing Punch," and ask you if you can identify that as one of the drawings which you have supplied to me, and as illustrative of the shearing punch as employed by the machines for making zippers at Union Slide Fastener? A. Yes.

Q. That drawing was made by you; is that correct? A. That's right.

Q. On May 22nd, 1950? A. Yes.

Q. And illustrating the shearing punch in use as of that time? A. That's right.

Mr. Lyon: That drawing will be offered as Plaintiff's Exhibit 4.

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 4, and is hereto attached.)

Q. (By Mr. Lyon): I show you another drawing entitled "Union Slide Fastener, Inc., No. 18-3, Right and Left Notching [12] Dies," and ask you if that is not a drawing made by you, it has your name on it, dated May 23rd, 1950, and if it is not a drawing illustrating the right and left notching dies as employed by the Union Slide Fastener as of that date? A. Yes.

Mr. Lyon: That will be offered as Plaintiff's Exhibit 5.

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 5, and is hereto attached.)

Q. (By Mr. Lyon): I show you another draw-

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

ing entitled "Union Slide Fastener, Inc., 17-3, Shearing Die." I do not see a date on it. I ask you if that is another drawing made by you, bearing your name, and illustrating the shearing die of the slide fastener manufacturing machines employed by Union Slide Fastener? A. Yes.

Mr. Lyon: That will be offered as Plaintiff's Exhibit 6.

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 6, and is hereto attached.)

Q. (By Mr. Lyon): I show you another drawing entitled "Union Slide Fastener, No. 281, Main Eccenter Shaft," and ask if that is not a drawing supplied to me by you, which was made by you, bearing your name, and correctly illustrating [13] the main eccenter shaft of the slide fastener stringer machines employed by Union Slide Fastener?

A. I know this drawing was made by me, but whether or not I had supplied it to you, I have to look at my records. I don't recall that.

A. Well, I ask if it correctly illustrates the machines?

A. I think, to the best of my knowledge, yes.

Mr. Lyon: I will state, for the record, that all of these blueprints which I am now identifying are your prints.

The Witness: I know. I will identify them all, but a number of them I don't recall whether I gave

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

them to you or not. I will have to look at my records.

Mr. Lyon: The drawing just identified will be offered as Plaintiff's Exhibit 7.

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 7, and is hereto attached.)

Q. (By Mr. Lyon): I show you another drawing entitled "Ram Block, U. S. 41," and ask if that is not a drawing made by you, bearing your name, and showing the ram block as employed on or about June 15th, 1950, by the Union Slide Fastener in the machines employed for manufacturing zippers?

A. This drawing was not made by me.

Q. It was checked by you? A. Right. [14]

Q. Who is J. H. P.?

A. A former employee of mine.

Q. Now, this drawing which you have just identified, is that illustrative of the ram block in the stringer manufacturing machines employed by Union Slide Fastener on or about June 15th of 1950? A. Yes. I guess so.

Mr. Lyon: That drawing will be offered as Plaintiff's Exhibit 8.

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 8, and is hereto attached.)

Q. (By Mr. Lyon): I show you another drawing entitled "Punch Holder" bearing the date of

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

5/7/50, and having the notation "Checked by P. Lipson," and ask if that drawing is a drawing correctly illustrating the punch holder employed in the stringer manufacturing machines on or about May 7th, 1950, by Union Slide Fastener?

A. There is no date on this, so I couldn't tell exactly when it was made. 5/7/50?

Q. Can you answer the question as to whether or not that illustrates the punch holder as employed by Union Slide Fastener on or about that date? A. Yes.

Mr. Lyon: That drawing just identified by the witness is offered as Plaintiff's Exhibit 9. [15]

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 9, and is hereto attached.)

Q. (By Mr. Lyon): I show you another drawing entitled "Stripper," dated September 5, 1947, and ask you if you can identify that?

A. As what?

Q. Pardon? A. As what?

Q. Well, do you recognize it, do you know what it is?

A. It looks like the stripper. Whether it is the real thing I don't know, because that wasn't—that drawing wasn't made by me. It wasn't checked by me.

Q. That is one of the drawings, however, that was supplied by you to me, is it not?

A. Well, at the time I stated to you that some

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

of those drawings were not new ones. They were drawings that were laying around, and whether they are correct or not I cannot say, because they were not made by me, neither were they checked by me.

Q. So far as you can tell by inspection, however, it is generally illustrative of the stripper employed by the machines at Union Slide Fastener?

A. No, there are some things that are not exactly like the ones that we are using.

Q. For instance? [16]

A. The angle and the radinses do not correspond.

Q. Well, leaving aside for the moment the questions of angles and dimensions, could you say fairly that the drawing is generally illustrative of the machine currently in use at Union Slide Fastener? A. What machine?

Q. Of this part of the machine.

A. It resembles it slightly.

Mr. Lyon: The drawing just identified by the witness is offered as Plaintiff's Exhibit 10.

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 10, and is hereto attached.)

Q. (By Mr. Lyon): I show you a drawing entitled "Plate for Housing," dated September 5th, 1947, and ask you if that is another one of the drawings you supplied to me and, leaving aside the question of angles and dimensions, if it is not

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

generally illustrative of the plate for the housing of the stripper manufacturing machines employed by Union Slide Fastener?

A. Let me get that question again.

Mr. Fulwider: He had quite a lot in it.

(The question was read by the reporter.)

The Witness: It resembles a part that we were using at one time. I do not recall whether it was that time or not. [17]

Mr. Lyon: That drawing is offered as Plaintiff''s Exhibit 11.

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 11, and is hereto attached.)

Q. (By Mr. Lyon): I hand you one more blueprint, Mr. Lipson, entitled "Male." It does not seem to have a date on it; I ask you if you do not recognize that as generally similar to the punch used in forming the upset portion of the elements in the machines employed at Union Slide Fastener?

A. I don't understand the question, what do you mean by "upset."

Q. Well, the hook, what do you call the portion of a zipper element which is pushed up from the rest of the material in forming the element?

A. What we call it?

Q. Yes, what do you call it?

A. We call it the tit.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. Just substitute "tit" for "upset portion" in my question. I will reframe the question.

I ask you if you do not recognize that as a drawing representative of the punch which formed the tit of the zipper elements as employed by Union Slide Fastener?

A. It looks similar, but this drawing, when I handed it to you I told you it was an obsolete drawing. It wasn't [18] made by me, and it is the best one I had and I gave it to you.

Mr. Lyon: That drawing is offered as Plaintiff's Exhibit 12.

(Drawing referred to was marked by the Notary Public as Plaintiff's Exhibit 12, and is hereto attached.)

Q. (By Mr. Lyon): At the time we visited your plant, you will recall that was September 7th, 1951, and you will recall we had a photographer present.

A. I guess so, he had photographer's apparatus, but whether he was one I don't know. I don't know the man.

Q. I am going to hand you 12 photographs, showing a zipper manufacturing machine, and ask you if you do not recognize those as photographs that were taken of your machine on September 12th, 1951, and if you do not further recognize this series of photographs as being copies of those which I gave you some time in the fall of 1951.

A. I couldn't be sure about that, because I have

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

those photographs. I have never examined them. They are just laying around. I just got a few.

Q. I see.

A. Whether this is our machine or not I couldn't tell.

Q. Will you examine the photographs and tell me if you do not recognize your machine in those photographs?

A. There is a resemblance, but whether it is ours or [19] not I couldn't tell. I mean I can't tell whether that is an accurate photograph or not.

Q. It is going to take a long time, because I am going to ask you to show me in the photograph I am handing you now—— A. Yes.

Q. Can you see any element in that picture which you can recognize as not belonging to one of your machines?

A. Well, how can I tell that, as not belonging? Will you repeat the question again? I don't quite get it.

Mr. Fulwider: Mr. Lyon, as far as I am concerned, if you make a statement for the record that these are prints made by the photographer——

Mr. Lyon: That is correct.

Mr. Fulwider: ——of Mr. Lipson's machine, that we will be willing to stipulate that.

Mr. Lyon: I will stipulate to that, and I will make the statement that Meriman Photo Art were hired by me to go out and take these pictures, and

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

they made them, and copies of them were given to Mr. Lipson.

Mr. Fulwider: And these are another set of the prints, the same as you gave Mr. Lipson?

Mr. Lyon: That is correct.

Mr. Fulwider: That is satisfactory. That will save a lot of time. Have you got your set?

The Witness: I don't know whether they are all the [20] photographs. I got some of them.

Mr. Lyon: He got a full set of everything.

The Witness: A full set of them?

Mr. Lyon: Yes.

The Witness: How many are there supposed to be?

Mr. Lyon: There are supposed to be 12, but we will sure find out, because they are going into evidence.

Mr. Fulwider: You might let us have an extra set of them, if you can.

Mr. Lyon: We had an extra set, and Mr. Doble left them in Cleveland about a month ago.

The photographs concerning which we have just stipulated, the set of photographs which are numbered consecutively 5674-A through L are offered as Plaintiff's Exhibits 13-A through L respectively.

(Photographs referred to were marked by the Notary Public as Plaintiff's Exhibits 13-A through L respectively, and are hereto attached.)

Mr. Lyon: For your information, I turned these

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

drawings and these photographs over to Jim Oswald, who accompanied us to the plant and took dimensions from the machines themselves, and Jim Oswald then proceeded to make this drawing as illustrative of the machines, and I am wondering if we can have a stipulation subject to correction, if on further study by Mr. Lipson he should find any discrepancy, that [21] this drawing accurately and truly depicts the slide fastener machines in use by Union Slide Fastener.

Mr. Fulwider: Let me ask Mr. Lipson a question first off the record.

(A discussion was had off the record.)

Mr. Fulwider: We will stipulate as Mr. Lyon suggested, with the further agreement that the parties will collaborate to try and make Exhibit 14—I guess it will be 14——

Mr. Lyon: It will be 14.

Mr. Fulwider: ——Exhibit 14 a correct portrayal.

Mr. Lyon: With that stipulation I will offer the print entitled "Zipper Machine—Union Slide Fastener" as Plaintiff's Exhibit 14 to this deposition.

(Print referred to was marked by the Notary Public as Plaintiff's Exhibit 14, and is hereto attached.)

Q. (By Mr. Lyon): Now, Mr. Lipson, those machines that you have out at Union Slide Fastener for manufacturing slide fastener stringers,

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

they take a strip of uniform metal and form the slide fastener elements from it, don't they?

A. Yes.

Q. And they take a tape, fabric tape, and they attach the elements to the fabric tape; is that correct? A. Correct.

Q. Now, you used double-headed machines, that is, machines that make two individual stringers at the same [22] time; is that correct?

A. They can. I do not always use them in that way.

Q. Generally you do, correct?

A. Sometimes we make double and sometimes we make single stringers.

Q. Now, in forming these elements, attaching them to the tape, you feed a strip of metal intermittently through the machine, don't you?

A. Yes, I guess so.

Q. At the very end of that strip of metal, if you stop the machine there would be a pair of jaws formed at the end of the metal, which pair of jaws were formed by the preceding cutting away of an element; is that correct?

A. Well, please clarify that. Will you repeat that, please?

(The question was read by the reporter.)

The Witness: There is one question there. I don't quite understand what you mean by "stopping a machine." It depends at what point.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. (By Mr. Lyon): Well, if at any time you stop the machine in order to look at it——

A. Yes.

Q. ——there would be a strip of metal in the machine and it would have a pair of legs cut out on the end of the material, would it not?

Mr. Fulwider: A leading edge, you might say.

Q. (By Mr. Lyon): On the leading edge.

A. Yes, yes.

Q. Now, those jaws would have been formed by removing the intervening material between them as you cut off the element that has just been formed; is that correct? A. No.

Q. How is it incorrect? In what manner is it incorrect?

A. We will not remove any intervening material.

Q. When you sever an element——

A. Yes.

Q. ——from the end of the strip and attach that element to the tape—— A. Yes.

Q. ——you leave the end of the strip with jaws formed thereon, don't you? A. Yes.

Q. Those jaws are formed by the removal of the material that goes to make up the element that has just been attached to the tape; is that correct?

A. By removing some of it, removing the previous element.

Q. That is right, and part of that previous ele-

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

ment was material that was intervening between those jaws; right?

A. A part of the jaws—the element was a part of the jaws. There is no intervening material except the [24] element.

Q. In the manufacture of these stringers, when you have a strip with the jaws formed on the end of the strip, that strip is then advanced to place the jaws astraddle the tape; is that correct?

A. I didn't follow you through. Will you read that? It is quite involved, and I want to make clear what the question is.

Mr. Lyon: Will you read it.

(The question was read by the reporter.)

The Witness: Yes.

Q. (By Mr. Lyon): Then the jaws are clamped to the tape, are they not? A. Yes.

Q. Then you sever that particular element from the strip; is that correct?

A. I do not quite understand the question. You follow it after we close the jaws—there is some point in there—you asked me the question after we close the jaws. We don't sever it after we close the jaws.

Q. When do you sever it?

A. Simultaneously.

Q. Simultaneously with the closing of the jaws on the tape; is that correct? A. Correct.

Q. So then in your machine there is at least partial [25] contact of the strip by the severing

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

die at the same time that the closing jaws close the legs to the tape; is that correct?

A. Partial contact, you say, on what?

Mr. Lyon: I will strike the question.

Q. During the closing of the jaws to the tape and the severing of the element from the strip——

A. Yes.

Q. ——there is at least one period of time when the severing punch and the closing jaws are both simultaneously working on the element; is that correct? A. Yes, I guess so.

Q. Now, that strip moves in a straight line across the machine, does it not?

A. Across which way?

Q. As it approaches the punch the metallic strip moves in a straight line across the machine, does it not?

Mr. Fulwider: You mean horizontally?

Q. (By Mr. Lyon): Yes.

A. Well, then it all depends—it moves horizontally.

Q. It follows a fixed path as it approaches the punch, does it not? A. Yes, we hope so.

Q. At the same time the fabric strip is following a fixed path at right angles to the path of the strip; is it not? [26]

A. At right angles which way?

Q. Well, the strip is moving horizontally and the tape is moving vertically; isn't that correct?

A. Correct.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. They intersect, the path of the two of them intersects, does it not? A. Yes.

Q. And they both move intermittently?

A. Yes.

Q. The purpose of having the tape intersect the strip is to so position the tape so that as the strip moves intermittently forward it places the jaws of the element astraddle the tape; is that correct?

A. Please clarify that. Will you clarify that question, please?

Mr. Lyon: Well, read it.

(The question was read by the reporter.)

The Witness: Correct.

Q. (By Mr. Lyon): Neither the tape nor the strip ever backs up in your machine, do they?

A. Will you repeat that, please?

Mr. Lyon: I will rephrase the question. Maybe you will understand it.

The Witness: Yes.

Q. (By Mr. Lyon): In each case the movement is intermittent, but it is forward, it never has a reverse movement [27] so that either the tape or the strip moves back to where it was before it is stepped forward?

A. In the normal operation of the machine?

Q. That is correct. A. No.

Q. Now, do you understand what I mean when I say that in your machine there is an attaching station where the elements are attached to the tape?

A. Well, I don't know whether you would phrase it station or step or any other thing. There

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

are various names for it. Will you clarify it, please?

Q. Let us take the portion of your machine where the legs are clamped to the tape. You know where that is? A. Yes.

Q. Let us call that the attaching station. Do your machines have within a space of less than an inch from the attaching station means for performing all of the operations on that strip that are necessary to form a slide fastener element?

A. I couldn't tell that without looking at the drawings, without knowing that, whether it is less than an inch or more than an inch. I couldn't say that offhand.

Q. You do have in your machine closing jaws that close the legs of the element to the tape; that is correct? A. Yes.

Q. And just as close as you can get to those closing [28] jaws you have a punch that severs the element from the strip, do you not? A. Yes.

Q. Right adjacent to that you have a punch that makes the notches in the sides of the strip to make a square element; is that correct?

A. What do you mean by "adjacent?"

Q. Right next to it.

A. There is a punch?

Q. Yes. A. Yes, there is.

Q. Right next to that punch you have a die that cooperates with the punch on the base of the machine for forming the tits, do you not?

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

A. That question is not clear, when you say "right next to it."

Q. Touching it. A. When?

Q. When the machines is in use.

A. I do not understand your question. Will you repeat that, please?

Mr. Lyon: I will strike the question.

Q. You have a punch holder, don't you, or a tool holder in the ram? A. Yes.

Q. In that tool holder you have first a severing [29] punch working from what I have called the attaching station towards the other end of the machine. You have first a severing punch, you then have a punch that puts the two notches on each side of the strip, and you then have a die for forming the tit, and all of those are touching each other in one unitary assembly at that station, are they not?

A. No.

Q. I call your attention to the photograph, Exhibit 13-I, and ask you if you do not recognize that as the ram with the punching and forming tools being carried thereby which you employ at Union Slide Fastener?

A. This photograph is not very clear, to be able to state whether this is the punches and—that are put together. It is not clear there. There is a lot of shade and I can't distinguish.

Q. Well, I will show you 13-A, and ask you if you can do any better on that.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

A. This resembles the arrangement that we have.

Q. In that Exhibit 13-A there are at two stations an assembly of tools, are there not?

A. How was that?

Q. There are, as I am indicating here, an assembly of tools and there is a duplicate assembly over here, are there not? A. Yes.

Q. Now, in that assembly, starting from the top and [30] working down, the first tool is the tool for severing the element from the strip; is that correct? A. I think so.

Q. Right underneath that you find a tool for putting the notches on the side of the strip; isn't that correct? A. No.

Q. What is the next tool there?

A. This looks like it is one tool. It is not two separate tools.

Q. They are formed as one tool? Then instead of being a separate severing tool and a separate notching tool, they are all made of one piece; is that correct? A. Yes.

Q. And they are right together there?

A. Yes.

Q. The next thing we find is this tit-forming tool; is that correct? A. Yes.

Q. Is that all one piece, too? A. Yes.

Q. All together? A. No, no, no.

Q. That is a separate piece?

A. A separate piece.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. From the severing and notching tools; is that correct? [31]

A. Correct.

Q. But it is right up against it there, is it not?

A. Yes.

Q. In those machines can you tell me the distance from the tit-forming tool and the severing tool?

A. I don't follow your question. Just what do you mean?

Q. You have identified in this photograph this tit-forming tool here? A. Yes.

Q. And this severing tool here? A. Yes.

Q. Can you tell me approximately what the distance from here to here is on those two tools?

A. I wouldn't know offhand.

Q. Could you give it to me in an approximation?

A. I would have to figure that out. I don't recall exactly. I don't want to be wrong on the answer. It would have to be measured before I could.

Q. If they are going to be made the same size as you have got them made they couldn't be any closed together, could they?

A. Just what do you mean by "closer together"?

Q. Well, they are already touching each other, aren't they? A. Of course they are. [32]

Q. And you certainly could not get them in any closer contact, could you?

A. The two punches you are talking about?

Q. Yes.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

A. Yes, they are close together.

Q. Again referring to Exhibit 13-A, that generally shows a ram, does it not?

A. There is some foreign part in here which makes it that it does not resemble mine.

Q. What is that?

A. My ram does not have this part here (indicating).

Q. Are you referring to apparently a piece of metal that was placed underneath that ram to tilt it up so that the photographer could get it at the proper angle? Is that what you are referring to?

A. It looks like it is a part of it. It is a piece of metal. It looks like a part of it.

Q. That is what it is.

A. It looks like a machine part.

Q. It is what we found in your plant and we used to prop up the machine. In referring to Exhibit 13-A, I will make a notation on the photograph in pencil, leading to a block of metal, and ask you if it is not a fact that that block of metal I have marked with a lead line and the figure A is a block of metal that is not a part of the ram.

A. Just what was the question, please? [33]

(The question was read by the reporter.)

The Witness: I wouldn't know.

Q. (By Mr. Lyon): Don't you know what is in your ram?

A. In our ram, this isn't a part of it.

Q. That is what I asked you, and by "this"

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

you mean the block of metal I have indicated as "A" in Exhibit 13-A? A. That is right.

Q. But your machines do have a ram as depicted in Exhibit 13-A; is that correct?

A. It resembles it. I don't know whether that is exactly the same or not. It resembles it.

Q. Well, now, we are either going to determine what you have in your machines or we are not going to. If you are not going to accept the stipulation that your counsel made that subject to any corrections or discrepancies which you may later find, these drawings and these photographs show your machines, we are going to be here all day, because if you say that resembles your ram, and you are not willing to unqualifiedly state that it is your ram I am going to ask you to point out in detail any difference between that photograph and the ram which you installed in this machine on September 7th, 1951, when we took the picture.

Mr. Fulwider: Well, I think you are right. We stipulated that based on your statement the photographs were photographs of Mr. Lipson's or the Union Slide Fastener ram. If you see anything in this photograph that appears [34] to you not to be in your ram or to indicate to you that the photograph is in error you can point it out. There are many things there that are not clear, and I think that is what the witness had in mind. He can't see everything in the photograph.

The Witness: The photo is taken at an angle,

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

and it has various shades in it, and I couldn't truthfully say it is exactly the same. I say it resembles. I cannot say—sometimes photos are taken at an angle where you cannot decide whether those other shades are off here, and I can't truthfully say that it is a photograph of the ram I am using. I say it resembles it.

Q. (By Mr. Lyon): Take Exhibit 13-A together with 13-I, there are two different angles of the same ram, and can you state whether or not those photographs show the ram as employed by Union Slide Fastener in its zipper-making machines?

A. This one resembles the other. It is a little clearer than the other one, but I cannot truthfully say that it is it.

Mr. Fulwider: Let us put it this way: so far as you can see it seems to accurately portray it, but you cannot guarantee it?

The Witness: That is right. Photographs are taken at certain angles.

Q. (By Mr. Lyon): Those machines do have a ram, do they [35] not?

A. We call it a ram block.

Q. And they have a base? A. Yes.

Q. In operation that ram reciprocates up and down with respect to the base, doesn't it?

A. Correct.

Q. In those machines a strip of metal is fed into and through the machine between the ram and the base, is there not?

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

A. No, it is not fed in between the ram and the base.

Q. Well, the strip is sent over the top of the base is it not? A. Over the top of the base?

Q. Yes.

A. No, we don't consider it that way.

Q. Well, the strip is lying on the base, is it not?

A. No.

Q. Is it down in the base somewhere?

A. That is right.

Q. The ram is up above that, is it not?

A. Yes.

Q. So is it not the accurate thing to say that the strip is between the ram and the base?

A. I wouldn't say so.

Q. But the ram is above and the base is below?

A. That's right.

Mr. Fulwider: A portion of the base is below.

Q. (By Mr. Lyon): Is there means in your machines, carried by the ram and by the base and actuated entirely by the movements of the ram, for forming the elements, including the legs at the end of the strip?

A. Will you clarify that? What do you mean by that? I am not an attorney, and I don't know what you mean.

Q. In your machines the punch elements are carried entirely by the ram; right?

A. Not exactly.

Q. Well, the tools that we see mounted in Ex-

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

hibits 13-A and 13-I are carried entirely by the ram, aren't they? They move with the ram.

A. Which is 13?

Q. You have them right in front of you.

A. Those two?

Q. Yes.

A. There are two punches that are carried by the ram.

Q. That is right. And those are the punches for forming the elements and cutting them off, are they not?

A. They do part of the work, but they don't do all the work.

Q. What you are reserving in your mind when you answer that question is that there are dies and cooperative [37] parts mounted in the base that cooperate with the punch elements carried by the ram; is that what you have in mind?

A. Correct.

Q. That ram carries a cutting off tool for cutting off the endmost element, and it also carries a pair of cams which engage some clamping elements for clamping the legs of the element to the tape; isn't that correct?

A. Not quite. The question is not clear to me.

Mr. Lyon: Will you read the question, Mr. McClure.

(The question was read by the reporter.)

The Witness: Yes.

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Philip Lipson.)

Q. (By Mr. Lyon): Those elements are a pair of jaws that are mounted on the base, those clamping elements; right? A. Yes.

Mr. Fulwider: I didn't understand that. The jaws——

Mr. Lyon: Well, in a preceding question I referred to a clamping element. This question asks him if the clamping element is not a pair of jaws mounted on the base, and he said "Yes."

Mr. Fulwider: That is, the clamping element, do you refer to clamping the legs of the element?

Mr. Lyon: That is correct.

Mr. Fulwider: You have got a couple of elements there. You got me a little confused.

Q. (By Mr. Lyon): Those jaws are disposed to either side of the tape and move towards each other for engaging and [38] closing the legs of the element on the tape; is that correct?

A. I think so.

Q. Those jaws are actuated by being engaged by cams which have cam faces on them, which cams are mounted upon the ram; is that correct?

A. Just what do you mean "cam faces"? I don't understand that question.

Q. This edge, this beveled edge right there on the cam.

A. That is part of the cam, that is not a face.

Mr. Lyon: We will reframe the question.

Q. There are mounted on the ram cams. The cams have faces. There are formed upon the jaws

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

cooperating faces which engage the cam faces on the cams mounted on the ram, so that on downward movement of the ram the cams drive the jaws into engagement with the legs of the element and attach the element to the tape; is that correct?

A. Just what do you call "faces"? I don't understand.

Q. The working face of the cam, the part that engages the cooperative face.

A. That is not called a face. That is called an angle, a cam angle. That is why I don't know what you mean by "face." It describes it in such a way that it is not clear to me.

Q. I will rephrase it then, and instead of "face" we will use "cam angle." [39] A. Yes.

Q. There are cams carried by the ram, those cams have cam angles. There are jaws mounted on the base. Those jaws have cam angles which are engaged by the cam angles on the cams on the ram; right? Is that right?

A. I don't quite understand it. You have it involved—will you split the question up a little bit? I can't follow you. You are an attorney. You don't realize that I am not.

Q. I will give it to you very slowly.

A. Yes.

Mr. Fulwider: Give it to him part by part.

Q. (By Mr. Lyon): Starting out, you have a ram; right? A. Yes.

Q. The ram carries cams; right?

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

A. The cams are attached to the ram.

Q. The cams have cam angles? A. Yes.

Q. Correct? A. Yes.

Q. Now, you have jaws; correct? A. Yes.

Q. Those jaws are mounted on the base; right?

A. Yes.

Q. Those jaws also have cam angles; right?

A. They have angles. [40]

Q. The angles on the jaws cooperate with or are engaged by the cam angles on the cams; right?

A. Correct.

Q. So that on downward movement of the ram the jaws are driven into engagement with the legs of the element, and the legs are clamped to the tape; is that correct? A. I guess so.

Q. Your machine has a shaft, does it not?

A. Oh, it has more than one shaft.

Q. It has one that you call the main eccenter shaft; is that right? A. Yes.

Q. That is the subject of the blueprint which has been identified here as Plaintiff's Exhibit 7; is that correct? I will show you Plaintiff's Exhibit 7.

A. Yes, that is the eccenter shaft.

Q. That shaft is carried by the base; is that right? A. It is mounted in the base.

Q. Mounted in the base? A. Yes, sir.

Q. That ram is driven from the main eccenter shaft, is it not? A. It is driven what?

Q. Driven from that shaft; is that correct?

A. Driven by the shaft?

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. That is right. [41] A. Yes.

Q. There is a pair of connecting rods between the eccenter shaft and the ram; is that correct?

A. Yes.

Q. They drive the ram; is that correct?

A. Yes, sir.

Q. I wonder if you could give me some idea of the degree of eccentricity of the eccentrics on that main eccenter shaft?

A. They are marked on the drawing.

Q. Where? A. Right here.

Q. What would that indicate the eccentricity of that eccentric to be?

A. I guess I forgot to put it down. I made the drawing myself. I forgot to put it on.

Q. What should it be?

A. That is approximately one eighth of an inch, the drive is one eighth of an inch.

Q. That is the total travel of the ram?

A. That's right, that would be a sixteenth of an inch eccentricity.

Q. Would you call that a large or a small degree of eccentricity?

A. Well, that is rather hard to say. It depends on what point of view you are looking at it. [42]

Mr. Fulwider: That is right.

The Witness: From the point of view of a jeweler it is large, from the point of view of a forging hammer it is small.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. (By Mr. Lyon): This base in your machine carries a die block, does it not?

A. The base carries what?

Q. A die block.

A. What would you—will you describe what you mean by "a die block"?

Q. You have pointed out on Exhibit 13-A and 13-I—— A. Yes.

Q. ——some tools carried by the ram?

A. Yes.

Q. There are some cooperative tools mounted in the base; isn't that correct? A. Yes.

Q. Don't we generally call the type of tools that are mounted in the base dies? A. Yes.

Q. They cooperate with the punches in the ram; is that correct? A. Yes.

Q. Those dies that are mounted in the base are tied together in a unitary assembly in which they are mounted, are they not? [43] A. Yes.

Q. Let us call that unitary assembly a die block.

A. We call it a die housing.

Q. All right, then we have a die housing mounted in the base? A. Yes.

Q. And it has some dies mounted in the housing: right? A. Yes.

Q. I think you have previously identified the severing tool and the tit-forming punch carried by the ram; right?

A. Yes, I say they resemble those that I use.

Q. Now, calling your attention to Plaintiff's Ex-

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

hibit 13-H, which I believe we have a stipulation shows your machine, and looking at the photograph, as you are, there are two sides of the machine, the one that is readily seen in the picture and the one on the back which is not seen. Let us call the side of the machine shown in the photograph 13-H the front side of the machine. Can you tell me: are the tools, the die block, the punch, the cut-off tool arranged on the front side of the machine so that they are readily accessible from the front side of the machine? A. It seems so.

Q. You have supplied us with certain drawings which have been identified here as Plaintiff's Exhibits 1 through [44] 12. Are there any other drawings that are illustrative of these machines as they were originally built or as they were changed at any time?

A. I have not made any recent drawings since I gave you those.

Q. You have given us all the drawings that were available; is that right?

A. Yes, from our drawings I had, and some were obsolete ones that were laying around.

Q. Union Slide Fastener, since you were an officer, received notice of infringement from Talon, Inc., did it not? A. No.

Q .Well, as an officer of the corporation, can you tell me whether Union Slide Fastener has ever received a notice of infringement from Talon, Inc.?

A. Not during the time I was an officer.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. Had it received a notice of infringement before you became an officer? A. Yes.

Q. When was this notice of infringement received?

A. It wasn't a notice of infringement. It was a notice that they think that we were infringing. That was some time—as far as I can recall, it was some time in November or December, 1947.

Q. Did you ever sell any chain machines in the United States? [45]

Mr. Fulwider: Does the witness know what you mean by "chain machine"?

The Witness: I know what chain machines mean.

Mr. Fulwider: I do not. I am learning fast.

The Witness: I am not clear about what you mean when you say "selling in the United States"; to another manufacturer of zippers?

Q. (By Mr. Lyon): Do you know what I mean when I say "sell a machine"? A. Yes, I do.

Q. Did you ever sell a chain machine?

A. In the United States?

Q. Anywhere. A. Yes, I did.

Q. Did you ever sell any in the United States?

A. I don't know whether you can call it a sale or not. There is one point I have to clarify here.

Q. Are you now referring to the time that certain machines were turned over to Mr. Loew when you ceased connection with him? A. Yes.

Q. Aside from the transaction with Mr. Loew did you ever sell any machines in the United

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

States? A. No.

Q. Did you ever sell any in any foreign country? [46] A. Yes.

Q. What country?

A. Mexico and Canada.

Q. Did you ever sell any in Great Britain?

A. No.

Q. Did you ever offer to sell any in Great Britain?

A. Just what do you mean by "offer"?

Q. Did you ever solicit any customer in Great Britain? A. Yes.

Q. As a matter of fact, you made a trip to Europe in 1948, did you not? A. Correct.

Q. You went all over Europe trying to sell these machines, did you not? A. No, I didn't.

Mr. Fulwider: "All over" is pretty broad.

Q. (By Mr. Lyon): The machines which you say you sold in Mexico and Canada, those were manufactured here by Union Slide Fastener, were they not? A. Correct.

Q. When were those machines sold in Canada?

A. I believe, from my recollection, that one was sold in 1948.

Q. When in Mexico?

A. In Mexico in 19—well, when you say "sell" just what do you mean, the time when those [47] machines were offered, the time they were shipped, or the time that the——

Q. The time they were shipped.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

A. The time they were shipped? During '50, during 1950.

Q. These machines were the same type that you are using at your plant? A. Not exactly.

Q. They had the same working principle, didn't they? A. More or less, yes.

Q. The only differences would be in dimensions and angles and things like that?

A. No, there is also a difference in other things, too.

Q. In what way did they differ?

A. Well, in various ways. I think that we do not remove the chips in the same manner as we did before. We do not move the stock in the same manner, we do not have the same travel. We have made changes in them.

Q. Are there any other changes that you can give me besides the chip removing change and the tape feeding or the strip feeding mechanism?

A. Offhand I wouldn't know. We made a lot of changes in them, also changes in the tape tension.

Q. Well, was there any difference in the manner of mounting the tools in the ram?

A. Yes, there is a difference. [48]

Q. What was that difference?

A. The difference in the adjustment of the ram —of the tools.

Q. But the tools were mounted in the ram more or less as shown in Exhibits 13-A and 13-I; is that correct? A. More or less, yes.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. Was there any difference in the die housing and the dies contained in the die housing?

A. A difference in the size or dimensions, or which do you mean?

Q. Stick to size and dimensions for the time being. A. They had die housings, yes.

Q. And generally similar to the die housings in your current machines; right?

A. I don't know what you mean "similar."

Q. Working on the same principle, Mr. Lipson.

A. Yes, I would say yes.

Q. And they had closing jaws on the base; right? A. Yes.

Q. Those closing jaws are driven from cams on the ram; is that correct? A. Yes, correct.

Q. And the cams reciprocate above the base; is that correct?

A. Just what do you mean "reciprocate"?

Q. Moving up and down. [49]

A. Moving up and down?

Q. Yes. A. Yes.

Q. There were eccentrics attached to a main eccenter shaft mounted in the base; right?

A. Eccentrics?

Q. Strike that. There were connecting rods?

A. Yes.

Q. Connecting rods between the ram and the eccentric shaft in the base? A. Correct.

Q. And those correcting rods drove the ram; is that correct? A. Yes.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. The eccentric shaft had an eccentric on it of about the same degree in eccentricity as your current machines; is that correct?

A. More or less.

Q. Referring to this die housing in the base, what elements do you have down in this die housing?

A. I do not follow you. What do you mean by "elements"?

Q. What does the die housing contain?

A. What does the die housing contain?

Q. Yes, what is in there?

A. The die housing consists of two blocks joined together, a block supporting the male punch, a male punch, [50] two notching punches and a shearing die.

Q. If you took those dies out of the die housing and tried to run the machine would you successfully form a tit?

A. I don't know, I never tried it.

Q. Mr. Lipson, you have had considerable experience as a machinist, have you not? A. Yes.

Q. Before coming to this country you were working as a machinist, were you not?

A. As a toolmaker and engineer.

Q. Now from your experience can you tell me if we take a strip of metal—— A. Yes.

Q. ——and we hit it with a punch——

A. Yes.

Q. ——if it is entirely unsupported will that

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

punch successfully form the tit in the strip of metal in the absence of a die?

A. Your question is not clear to me, when you are talking about a punch. What kind of a punch, two kinds of punches.

Mr. Fulwider: You say entirely unsupported?

Q. (By Mr. Lyon): As a toolmaker——

A. Yes.

Q. ——and engineer—— A. Yes. [51]

Q. ——do you have any opinion——

A. Yes.

Q. ——as to what would happen——

A. Yes.

Q. ——in this machine—— A. Yes.

Q. ——if you took the die that cooperates with the punch for forming the tit—— A. Yes.

Q. ——and left that die out of the die holder?

A. Yes.

Q. What is your opinion as to what would happen? A. Nothing would happen.

Q. You would not form the tit, would you?

A. No.

Q. Now, similarly, if you took the die that cooperates with the punch—— A. Yes.

Q. ——that does the severing—— A. Yes.

Q. ——and you left that die out of the die holder—— A. Yes.

Q. ——could you rely on the tool under that setup to do a proper job of severing the element?

A. No.

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Philip Lipson.)

Q. Suppose the legs of the element had already [52] been closed on the tape, would that make any change in your last answer?

A. That is a hypothetical question. I don't know. I never tried it. Maybe it would bend it, maybe it would cut it.

Q. And it might just tear it loose from the tape; right?

A. It might just tear it loose from the tape, I never tried it.

Q. In these machines you employ at Union Slide Fastener for manufacturing stringers you have got feeding means for feeding the tape, do you not? A. Yes.

Q. That tape moves in a fixed path past a predetermined position, does it not? A. Yes.

Q. You also have feeding means for feeding the metallic strip, do you not? A. Yes.

Q. And you feed that metallic strip towards the same position that you feed the tape, to where they intersect, do you not? A. Yes.

Q. Now, those machines include in a region not to exceed one inch in diameter around that point of intersection means for performing all of the operations upon the metallic [53] strip to form slide fastener elements from the strip and to attach the elements to the tape, do they not?

A. I don't know whether they are within the inch. Offhand I couldn't say, without checking my record.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. The machines include a base, I believe you said? A. Yes.

Q. And a ram? A. Yes.

Q. And means for reciprocating the ram?

A. For moving the ram.

Q. Moving it up and down? A. Yes.

Q. And means carried by the ram and the base and driven by the ram for forming portions of elements in the strip; is that correct? A. No.

Q. In what manner is it incorrect?

A. You say "portions of elements." I don't know what is meant by "portions of elements."

Q. Well, you make the tit, do you not?

A. Yes.

Q. You make the legs? A. Yes.

Q. And the legs are at the end of the strip; is that correct? A. Yes. [54]

Q. And then the feeding means moves the strip so as to place those legs astride the tape; is that correct? A. Yes.

Q. Then you have carried by the ram cutting off means for cutting the element from the strip; right? A. Yes.

Q. Then you have the closing jaws for attaching the legs of the element to the tape; is that correct?

A. That is part of the ram, yes.

(A recess was here taken at 11:55 until 1:40 p.m.)

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Philip Lipson.)

Direct Examination—(Continued)

Q. (By Mr. Lyon): Mr. Lipson, in the machines that you are operating at the Union Slide Fastener after an element is closed about the tape it moves on the tape directly upwards, does it not?

A. It moves on the tape, or with the tape?

Q. With the tape. A. Yes.

Q. Now, those elements in the stringers as manufactured by you are fairly close together, are they not?

A. The tits, you mean, of the element?

Q. One element is spaced from another element only a very short distance; isn't that correct?

A. Yes. [55]

Q. What I am trying to get at is: is it possible in your machines that these closing jaws which clamp the element to the tape would strike more than one blow on the element as that element passed upwardly through the machine on the tape?

A. No.

Q. Well, referring for a moment now to Exhibit 13-L, this is a closing jaw, is it not, that I am pointing out?

A. I can't see from that distance.

Q. This is a closing jaw?

A. Well, it is receded. You only show the closing jaw housing. The closing jaw is some place inside. This is the housing of the closing jaw.

Q. Here is the closing jaw?

A. You are showing it in a position where the jaw is receded into the housing.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. Referring now to Plaintiff's Exhibit 1 to this deposition, will you point out on that drawing, if it is shown there, a drawing of the closing jaw?

A. This drawing is similar to the one we are using, but the man who made this drawing did not show it in detail here. The way we make the jaw it cannot strike more than once.

Q. You mean you put a sloping edge on the——

A. This here goes — recesses away, and then there is a little point over here which holds the element down while [56] it is being closed, so that it does not clamp the element beyond, but if it jumps over that thing there this is recessed further back. It does not strike it again.

Q. Could you take a pencil and paper and sketch that closing jaw?

A. I could. No objection to that, is there?

Mr. Fulwider: No, that is all right.

The Witness: I will just show you the face of it, the contour. It is like this here. I may exaggerate, because it is actually not that large. This is recessed a few thousandths back. Now, this part here is made with a little radius here. That holds, let's see—let's say this is your element here, and there is the other jaw on the opposite side. This holds the element down so that it does not turn, and when it recedes here this element jumps over this part here, and it stays here, but this part being recessed away further than this one it cannot strike it any more. We only close it at one stroke.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. (By Mr. Lyon): If I understand your sketch properly, this is the closing jaw?

A. That is the closing jaw.

Q. You might say this is a side view of the closing jaw? A. That's right.

Q. This jaw moves in this direction to close and in this direction to open? [57]

A. To open, yes.

Q. This we will call the jaw. We will letter that "Jaw." A. Yes.

Q. This is the element here?

A. Yes, correct. That is also—that is the other side of the element.

Q. This is the other leg?

A. Well, I didn't make a complete drawing. I just wanted to illustrate that one point.

Q. The tape would be going up, passing this way? A. That's right.

Q. I will put some tape in there, and we will call that "Tape"; right? A. Yes.

Q. Now, there is an angle here that prevents this from striking?

A. Not an angle. It is recessed. It is further away a few thousandths back of this here. These two are not on the same level.

Q. In other words, the line I am drawing out here, we will call that "A"—— A. Yes.

Q. ——and then a line drawn from here——

A. Yes.

Q. ——we will call it "B"— [58]

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

A. Yes.

Q. ——would be a few thousandths distant?

A. That's right.

Q. And that prevents the upper part of the jaw from striking the second blow?

A. Naturally it wouldn't strike it because there is clearance.

Mr. Lyon: The sketch will be offered as Plaintiff's Exhibit 15.

The Witness: I can make a better sketch, if you want it. I didn't know you wanted to put it in as an exhibit.

(Sketch referred to was marked by the Notary Public as Plaintiff's Exhibit 15, and is hereto attached.)

Q. (By Mr. Lyon): Mr. Waldman is your foreman; is that correct?

A. At the present time, yes, Murray, M-u-r-r-a-y.

Q. Murray Waldman? A. Yes.

Q. Did you know that prior to the time when Mr. Waldman first was employed by the Union Slide Fastener Company that he had previously been employed by the Cap-Tin Company of Los Angeles?

A. I really don't know. He told me he worked some place where they made aluminum sash, that he was a foreman over there, that's all. I beg your pardon, did you ask me [59] whether that was prior to the first time he was employed?

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. Yes.

A. No, I have no idea. I thought you meant this last time when I employed him. At that time I didn't know where he worked before.

Q. You have never heard of his working for Cap-Tin?

A. No, I never heard of Mr. Waldman except one time when I was introduced to him. I visited Mr. Loew's factory just as a friend of his, and he introduced me to Mr. Waldman.

Q. Did Mr. Waldman ever tell you that he had been employed by an organization in which David Silberman was an associate?

A. Did you—was the question whether he ever told me?

Q. Yes.

A. Oh, yes, he did tell me this recently.

Q. Did Mr. Waldman ever tell you what, if any, part he had in the building of the original machines for making slide fastener stringers at the Union Slide Fastener Company?

A. I didn't get that question clear.

Q. Did Mr. Waldman ever tell you what, if any, part he had in the building of the first chain machines at Union Slide Fastener?

A. Well, he told me recently, since I employed him, that he helped Mr. Loew build the machine.

Q. How long have you known Sigmund Loew?

A. How long have I known him from what, today, from now?

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. Yes.

A. I have met Sigmund Loew in February or—January or February of 1947.

Q. At that time he was operating the Union Slide Fastener Company in Los Angeles?

A. He said so, I don't know. Whether he operated Union Slide Fastener or any slide fastener I don't know.

Q. Did you ever meet David Silberman?

A. Yes.

Q. Where?

A. At the Hollywood-Roosevelt Hotel in August, 1948.

Q. Who was present?

A. Mr. Loew, myself and Mr. Silberman. Later on one of his friends joined the table, but that was after we were through discussing the matters we came to discuss with him.

Q. At that meeting Mr. Silberman complained to you and to Mr. Loew, did he not, about certain activities of yours on your recent trip to Europe?

A. Yes.

Q. He was rather irate about some remarks you had made—— A. Yes.

Q. ——is that correct? [61] A. Yes.

Q. At that time did you make any agreement with Mr. Silberman?

A. Yes, we came to—he offered us a certain solution.

Q. What did he offer you?

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

A. He offered not to assert his patent rights against our firm providing we did not sell any machines in Europe where it would conflict with his business deal with I. C. I., Imperial Chemical Industries. He said "I do not mind you boys selling or operating your machines in any part of the world as long as you do not sell machines in Europe."

Q. At that time you had or were building a number of machines in excess of the requirements of Union Slide Fastener which you proposed to sell in Europe, did you not? A. That's right.

Q. At a subsequent time did Mr. Silberman call you from New York and suggest that if you were going to sell those machines in Europe you should sell them to him?

A. No, that wasn't exactly that.

Q. If something of that nature happened, tell me what happened.

A. At the time when we had the meeting we told him we had no contact or prospects for the sale of machines in other countries except Europe, and that inasmuch as we started to build a number of machines with the idea of selling them in Europe, whether he would not dispose of those machines for us. He said that he might be able to [62] sell those machines to Lightning Fastener which is a branch of the Imperial Chemical Industries. He suggested that he will have a certain Captain Smith, whose visit in the United States he expected, he would

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

have him contact us with respect to selling those 10 machines, providing we would not sell any machines in Europe.

Q. Subsequently he telephoned you from New York? A. He did not.

Q. And said he had Mr. Smith there, did he not?

A. He did not, I telephoned him.

Q. I understand, and the proposition was made that you should go to New York and——

A. A proposition was made that Mr. Loew should go to New York.

Q. At that time is was inconvenient for either you or Mr. Loew to go to New York, was it not?

A. Correct.

Q. And neither of you did go to New York?

A. No, I suggested to Mr. Silberman over the phone that we would have an agent of ours appointed by us contact him with respect to the sale of those 10 machines.

Q. If I understand the facts correctly, you never did sell those 10 machines to Mr. Silberman?

A. No.

Q. The deal just petered out; isn't that right?

A. You said on the 10 machines? [63]

Q. Yes.

A. I don't remember whether that was 10 machines or less. We didn't have 10 machines ready for sale, several machines.

Q. Whatever machines you had——

A. Yes.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

Q. ——the deal petered out, and you did not consummate a deal with Mr. Silberman; isn't that right?

A. No, we did not, on the machines.

Q. Referring again to Plaintiff's Exhibit 15, which is the sketch we drew, I will now draw a lead line and label that "C". Will you tell me just what you call that little projection which I have indicated with the lead line?

A. I don't know what you would call it. You can call it anything, it is a projection.

Q. What is its purpose?

A. Its purpose is to hold down the element while it is being clamped down, so that it does not get away from its perfectly vertical position—rather, horizontal position.

Q. Didn't you tell me this morning that clamping of the jaws to the tape and the severing of the element take place simultaneously?

A. That is correct.

Q. Wouldn't the cutting punch have control of the element—— A. No.

Q. ——as well as that little projection during the [64] closing of the jaws?

A. No, it wouldn't.

Q. The cutting punch is in engagement with the element during the closing of the jaws; isn't that right? A. Correct.

Q. Does the cutting begin to take place prior to

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Philip Lipson.)

the beginning of the closing of the jaws on the tape?

A. Well, that is rather a tough question. It depends on the machine, the way it works. The machine works at a very high speed, and it is awfully hard to control that. If the man adjusts this here downward a little too much it might start the joining much faster, much sooner than we want it, and it is awfully hard to determine it, but technically it is supposed to start simultaneously.

Q. Start cutting and start closing at the same time? A. Simultaneously.

Q. About what speed do you run your machines?

A. Well, depending on the metal we run, it is anywhere between 1,000 and 1500 r.p.m.

Q. Let us say a machine running at 1500 r.p.m.'s, and I assume you mean the closing stroke of the jaws—— A. Yes.

Q. ——those jaws are driven towards each other by the cam angle of the cams carried by the ram; is that right? A. Yes.

Q. And that thrusts the jaws towards each other? [65] A. Yes.

Q. Those jaws are made out of what?

A. Of steel, of tool steel.

Q. They will have considerable momentum, will they not, being driven at that speed?

A. No, I wouldn't say that. They would not have momentum, because the sideward movement is much less than the up and down movement of the

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Philip Lipson.)

ram block, because it operates at a certain angle—being that it is operated with an angle on the cam the speed naturally will be lower than the downward movement of the ram block.

Q. Well, that angle is 45 degrees, is it not?

A. No, not exactly.

Q. What is the angle on the cam?

A. I wouldn't be able to tell you offhand. I believe it is somewhere around 50 and 40.

Q. A while ago you identified this drawing, Plaintiff's Exhibit 1, and said that the drawing showed something similar to the closing jaws. By that you meant the two figures shown opposite the figure No. 4 on the circle on that drawing?

A. May I look at it? Yes.

Mr. Lyon: That is all.

(It was stipulated and agreed by and between counsel that the foregoing deposition may be signed before any [66] Notary Public, with the same force and effect as though read and signed in the presence of the Notary Public before whom it was taken.)

/s/ PHILIP LIPSON.

Subscribed and sworn to before me this 17th day of June, 1952.

[Seal] /s/ BETTY DAXON,

Notary Public in and for the County of Los Angeles, State of California. My Commission expires Sept. [illegible]. [67]

[Endorsed]: Filed July 18, 1952.

DEFENDANT'S EXHIBIT "Q"

[Title of District Court and Cause.]

DEPOSITION OF SIGMUND LOEW

Deposition of Sigmund Loew, called as a witness on behalf of the defendant, taken on Tuesday, the 25th day of November, 1952, at the hour of 10:00 o'clock a.m., at 5225 Wilshire Boulevard, 10th floor, Los Angeles, California, pursuant to Notice, before H. A. Singeltary, a Notary Public in and for the County of Los Angeles, State of California.

Appearances: For the Plaintiff: Lyon & Lyon, by: Charles G. Lyon, Esq. For the Defendant: Solomon Kleinman, Esq., Fulwider, Mattingly & Babcock, William J. Graham, Esq., by: William J. Graham, Esq. [1]*

SIGMUND LOEW

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Mr. Graham: This deposition is taken pursuant to Notice, the original of which has been handed to the reporter.

Direct Examination

Q. (By Mr. Graham): Mr. Loew, will you please state your full name?

A. Sigmund Loew.

Q. And your address?

A. 11162 Sarah Street, North Hollywood.

Q. What is your occupation now, Mr. Loew?

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* Page numbers appearing at top of page of Original Deposition.

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

A. Now it is just as a free lance consultant engineer.

Q. You understand fully the nature of this proceeding?

A. Not exactly. It is the first time. However,——

Q. Well, I will explain it to you in my own way and if Mr. Lyon has any amendments or additions I will be glad to have him make them.

We are taking your testimony which you are giving under oath. I will ask you questions, the stenographer will record the questions and your answers to the questions. He will then transcribe the questions and answers and submit them to you and you will have an opportunity to read them and to make any changes that you want to make, and then you [2] will swear to that deposition and it will become part of the permanent court record in the case of Talon against Union Slide Fastener.

Now, does that explain it to you thoroughly?

A. Correct.

Mr. Lyon: I might add to that, Mr. Loew, that the law permits me to interject with objections in case I think any of the questions that Mr. Graham is asking you are improper, and it will facilitate matters if you don't just snap your answers right out but give me a chance, if I desire to, to get the objection in.

The Witness: Yes, sir.

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

Mr. Graham: And Mr. Lyon also has the right to cross examine you if he so desires.

Mr. Lyon: That is correct.

Q. (By Mr. Graham): Mr. Loew, in 1947 and prior to that time you were in the business of manufacturing zippers; is that correct?

A. Correct.

Q. And your work was done here in Los Angeles? A. Yes.

Q. And did you have a company at that time?

A. Yes.

Q. Under which you operated?

A. That is correct.

Q. And what was the name of that company?

A. Union Slide Fastener Company. It was no corporation at that time. It was just a privately owned company.

Q. But you were the chief principal of that company? A. The sole owner.

Q. The sole owner? A. That is right.

Q. Now, you have also been an inventor of machinery for making zippers?

A. I have a patent on making zippers, if you call that an inventor. I have a patent in my name given by the Patent Office on the method of making slide fasteners.

Q. And do you recall offhand the number of that patent?

A. No, I do not. However, I will be able to

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

facilitate that and give it to you. I believe I have a copy at home somewhere. I am away from it now.

Q. Can you tell us briefly what that patent covered?

Mr. Lyon: I object to that. The patent is the best evidence of what it covered.

Mr. Graham: All right, I withdraw the question.

Q. (By Mr. Graham): Are you acquainted with David Silberman? A. Yes.

Q. How long have you known Mr. Silberman?

A. I have known Mr. Silberman since I believe 1940 or 1941—1940 I believe is more correct. [4]

Q. And at that time was Mr. Silberman engaged in the business of manufacturing zippers?

A. When I first met Mr. Silberman?

Q. That is right. A. Yes.

Q. Did you have a meeting with Mr. Silberman in the Hollywood Roosevelt Hotel at any time in 1948?

A. I had a meeting there together with Mr. Lipson. I don't remember if that was late 1948 or beginning 1949, but we had a meeting together with Mr. Lipson.

Q. And was that meeting at the Hollywood Roosevelt Hotel?

A. At the Hollywood Roosevelt Hotel. That was the only time I met with him at this place. So it must be—I just don't recall the exact date.

Q. Well, do you recall the year, whether it was 1948 or some other year?

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

Q. Did you say anything to Mr. Silberman about any such similarities?

A. Well, my main argument at that time to Mr. Silberman was that if he is using a square unit, which I believe he did, he is infringing on a patent of mine which was also issued about the same time —oh, I don't know if it is a few months before his patent or just about the same time—by the Patent Office, and it was at least as strong as his patent.

Q. That was your claim?

A. That was my claim.

Q. Now, was there any talk about suits being brought by Mr. Silberman or by you? [7]

A. No.

Q. Mr. Silberman didn't state to you that he was going to bring any suit against you?

A. Mr. Silberman in the course of the conversation expressed that if we stay away, if we don't sell any machines to Europe, he doesn't mind if we will be using his machine other places, by that I mean New York and so on. That was more or less, maybe not the exact words but what I gathered from the conversation with him.

Q. Did you agree that you would not sell any machines in Europe?

Mr. Lyon: I object to the question——

Mr. Graham: I withdraw that question. I said "Did you agree."

Q. (By Mr. Graham): Did you say anything

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

to him about whether or not you would sell any machines in Europe?

A. No arrangement was made whatsoever. He said that he was going to buy a number of machines we had at that time which we couldn't use ourselves in the plant at that time, which we made, that he is going to buy or sell them for us so we will not interfere. He called us once long distance to that effect from New York, and it died a natural death. We didn't do any more about it.

Q. Well, Did Mr. Silberman say anything to you about what he would do if you did sell your machines in Europe?

A. Well, I cannot really recall the exact [8] conversation, but the whole thing was at first Mr. Silberman was very much disturbed. In taking me aside, he wanted to jump Mr. Lipson, saying he made some bad remarks against the name of Dave Silberman in Europe, and the people have apparently notified Dave Silberman about it.

Q. Well now, these remarks Mr. Lipson made, Mr. Silberman said they were bad remarks; is that the intent of your testimony here?

A. No, he was very much disturbed. He said, "I don't know the man and he doesn't know me." That was the first time they had met, that time in the Hollywood Roosevelt Hotel; and of course I was trying to cool Dave Silberman off. I said, "Well, you didn't hear it exactly and I wasn't there and it just depends on how people interpret it.

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

I don't know what kind of remarks it was. I wasn't there, and it was certainly not in my behalf that he made those remarks. However, it depends a lot on how people give it over again, I don't know. So it is no use, I mean, feeling bad about it"; and I was trying to cool him off.

Yes, Mr. Silberman was there trying to persuade us, so to say, to give up that idea of selling machines. That was his main purpose the way I understood it.

Q. Well, did he say anything about what he would do if you didn't give up the idea of selling your machines in Europe?

A. Well, he certainly mentioned that there would be [9] lawsuits, and so on. He did mention that in the course of conversation. It wasn't just that he came to us and begged us and we should do him a favor and stop that, no. It was a question that he feels we are taking part of his machine and selling it into Europe; and I have some of my own units in it there, the square unit, but what we have doesn't count, just what he has counts, and so on and so forth.

I know we were supposed to hear from him regarding the matter. We more or less entertained the idea, that I remember, Mr. Lipson and myself at that time, if he would live up to his promise, let us say like buying a certain number of machines, which we did have a surplus at that time, that we will go along with him and not offer any more sales

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

or sell any more machines in Europe; but being—he didn't do anything about it any more, he didn't do any more about it so it just died off.

Q. I believe you did say that he did say he would bring suit against you if you insisted on selling your machines in Europe?

A. Well, he probably mentioned that. I just don't recall. The whole thing was in a spirit of he was trying to stop us and trying to persuade us that we are using his method or his machine.

Q. But he did talk about a possible suit?

A. Probably, yes.

Q. Did he say what kind of suit that would be?

A. No, not as I remember.

Q. Did he make any statement to you about his patent? Did he say that his patent—I withdraw that question. Did he say anything to you about his opinion of the quality of his patent, of his patent?

A. No.

Q. Did he say anything to you about the quality of your patent?

A. Yes, to a certain extent he was trying to belittle it, and probably he did say, like between us, we know they are splitting hairs in those patents on zippers, that everybody is using it, and it is like common property or something of that kind, and so on and so forth.

Q. Did you express any opinion about the quality of his patent?

A. Well, I just don't remember exactly. Cer-

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

tainly we were arguing at that time that I have used his—I agreed to him that I have used, I have adopted——

Q. That is not my question. Your answer isn't responsive. I asked you if you expressed any opinion about the quality of his patent?

A. Well, I didn't think that was a patent for a zipper machine. I thought it was a punch press, a converted type of a punch press at that time which had qualities but not exactly the zipper business. I wasn't trying to belittle him. I do not believe in hurting a man if he works on anything of [11] that kind.

Q. In 1949 did you have a meeting with Mr. Grosvenor McKee of the Talon Company?

A. Mr. McKee once visited our plant. Now, I don't know if this was in 1949 again, if that is the one you are referring to. Mr. McKee visited, came down in a taxi to our plant and spent some time there. Mr. Lipson was there, and I took him back part of his way to his downtown office or his hotel.

Mr. Lyon: I think we can agree on the date, Mr. Graham.

Mr. Graham: All right.

The Witness: I cannot tell you the date.

Mr. Graham: I think, Mr. Lyon, the date is April of 1949.

Mr. Lyon: That is right.

Mr. Graham: Is that agreed to?

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

Mr. Lyon: Yes.

The Witness: April, 1949? No, I had no meeting with him at that time, definitely, on account of in March, 1949, I have assigned all my interest and stock to Mr. Lipson. So I do believe that—maybe it was a meeting with Mr. Lipson and not with me.

Mr. Lyon: Well, there is just one such meeting. We will get the date exactly.

Mr. Graham: That has more or less fixed it as April, [12] 1948 (indicating).

The Witness: April, 1948, is correct. I thought it was before Mr. Lipson went even to Europe. That is correct, Mr. Lyon. I recall it right now. I think that is just about right.

Mr. Lyon: Well, let's fix it definitely; the early part of 1948.

Q. (By Mr. Graham): You recall it as April, 1948?

Mr. Lyon: April 15.

The Witness: I recall the meeting. The date I just cannot establish exactly.

Mr. Graham: I think we are agreed it is April 15, 1948.

Mr. Lyon: Yes.

Q. (By Mr. Graham): And on that occasion Mr. McKee visited the plant of Union Slide Fastener Company? A. That is right.

Q. Before that meeting do you recall having had correspondence with the Talon Company and

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)
the firm of Evans & McCoy, lawyers for the Talon Company?

A. I do not recall, but I do believe we received some kind of correspondence, but I had correspondence a few times with the Talon people and Mr. McKee.

Q. Well, what was the nature of that correspondence?

Mr. Lyon: I think we can agree that this correspondence is authentic, and why don't we just show it to him and [13] see if he can identify it?

Mr. Graham: All right.

Mr. Lyon: Mr. Loew, Mr. Graham has produced a file of letters—we may as well identify them for the record—the earliest of which seems to be a letter dated May 17, 1947, signed William C. McCoy, on the letterhead of Evans & McCoy, Attorneys, to the Union Slide Fastener Company; the next of which is a letter, apparently a file copy unsigned, on the stationery of Union Slide Fastener Company, dated June 16, 1947, to Evans & McCoy, having a typewritten notation, "Sigmund Loew, President," at the bottom.

The next of these is a letter dated September 15, 1947, on the letterhead of Evans & McCoy, addressed to Sigmund Loew, President, Union Slide Fastener, Inc., signed by William C. McCoy.

The next of these is a letter dated September 23—what appears to be your file copy of a letter

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

dated September 23, 1947, to Evans & McCoy, bearing the initials "PL/sm" in the corner, and the typed signature, Union Slide Fastener, Inc. That "PL" would be the manner in which your Stenographic Department indicated that the letter was dictated by Mr. Philip Lipson, would it?

The Witness: That is right.

Mr. Lyon: The next of these is a letter dated September 26, 1947, on the letterhead of Evans & McCoy, signed William C. McCoy, and addressed to Philip Lipson, [14] Union Slide Fastener, Inc.

The next of these is a letter dated November 12, 1947, on the letter head of Evans & McCoy, signed by Mr. McCoy, addressed to Union Slide Fastener, Inc., attention Sigmund Loew, President, or Philip Lipson; and you will note some pencil notations on the bottom of this letter to this effect, "Mr. McGee, Vice President of Talon."

The Witness: Yes.

Mr. Lyon: The next of these is what appears to be your file copy of a letter dated November 20, 1947, addressed to Evans & McCoy, signed Union Slide Fastener, Inc., by Philip Lipson, Secretary, and again having the "PL/sm" in the corner, indicating it was dictated by Mr. Lipson; is that correct?

The Witness: Right.

Mr. Lyon: And the next of these is a letter dated June, 22, 1948, to Mr. G. S. McKee, Vice President, Talon, Inc. This appears again to be

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

your file copy of such a letter, signed Union Slide Fastener, Inc., Sigmund Loew, President.

The next of these is a letter on the letterhead of Talon, Inc., dated June 25, 1948, bearing the notation, "Grosvenor S. McKee, Vice President-Works Manager," in the upper left-hand corner, addressed to Sigmund Loew, President, Union Slide Fastener Company, and signed G. S. McKee.

And the last of these letters appearing in this file [15] is a letter to Union Slide Fastener, Inc., on the letterhead of Evans & McCoy, dated January 20, 1948, signed William C. McCoy, and this letter is addressed to the attention of Mr. Philip Lipson.

And I will stipulate, if you wish, Mr. Graham, that these documents which I have just identified may be marked as an exhibit and that they constitute a series of correspondence between the persons whose names appear thereon and the persons to whom they were addressed.

Mr. Graham: Right.

The Witness: Well, may I make a remark?

Mr. Lyon: You may make any explanation you wish.

The Witness: There are a few letters here in connection with my correspondence with Mr. McKee asking him for a favor, that he send me some tape, which has nothing to do with this lawsuit, as you can see, and Mr. McKee answered and he

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

sent me the sample which I needed for some experimentation with the tape.

I do not recall sending this letter (indicating). It might be. It is more than five years, five and a half years. I don't see my signature and I do not recall.

Mr. Graham: The date on that letter is June 16, 1947, addressed to Evans & McCoy, on the letterhead of Union Slide Fastener Co.

Mr. Lyon: Well, can we mark these as exhibits and then give this one a sub-letter so as to identify it more [16] particularly?

Mr. Graham: All right.

Mr. Lyon: Why don't you offer them all as Exhibit whatever you want to give it, and then we will put A, B, C, and so forth, on the various letters.

Mr. Graham: All right. I offer these letters as Defendant's Exhibit 1. You have no objection?

Mr. Lyon: No objection.

Mr. Graham: All right, let's get these in chronological order again.

Mr. Lyon: They were in chronological order until he pulled that one out.

(Whereupon the letters above referred to were marked by the Notary Public Defendant's Exhibits 1-A to 1-J, inclusive, and are attached hereto and made a part hereof.)

Mr. Lyon: Let the record show that the letter to which the witness was referring when he stated

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)
he couldn't recall signing it has been marked Defendant's Exhibit 1-B.

Mr. Graham: So stipulated.

Mr. Lyon: I don't know that the record is straight on that, but in stipulating that this correspondence is correspondence between the parties I don't want it to be understood that I am stipulating that Exhibit 1-B was sent. I was just assuming it was. It now appears it may or may not have been.

Mr. Graham: You make that reservation in the [17] stipulation?

Mr. Lyon: Yes. I might state we will check our files and see if we received it, and if we have a copy we will admit it.

Mr. Graham: All right.

Q. (By Mr. Graham): Mr. Loew, does the series of correspondence which has just been introduced into evidence refresh your recollection that before Mr. McKee visited your plant on April 15, 1948, claim had been made against your company on behalf of Talon that you were infringing Talon's patents? Perhaps you would like to look at those.

A. (After examining the exhibits) Yes.

Q. And does it refresh your recollection that a request was made of you to permit a representative of Talon to examine your machines?

A. Yes. Mr. McKee came in and we didn't

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

hide anything. We showed him everything we had out there.

Q. I show you Defendant's Exhibit 1-G and ask you if you recall having seen that letter before?

A. I do not exactly recall but that was more or less the spirit in which we were working. So I must have read that. I haven't got such a good memory to remember all the details.

Q. All right. Mr. McKee did visit your plant. We have agreed that the date was April 15, 1948.

A. Right. [18]

Q. And did he inspect your machines?

A. Right. He went through the plant and he has seen machines.

Q. Did he watch the machines in operation?

A. Well, for a certain length of time, yes.

Q. And did he ask any questions about the machines?

A. Probably. I just don't remember exactly.

Q. Now, after he had inspected the machines, did you have any further conversation with him?

A. Well, yes, he came to the office and was discussing certain things.

Q. Was Mr. Lipson present at that time?

A. Mr. Lipson was present.

Q. Did Mr. McKee make any statement as to whether or not your machines were similar to Talon machines?

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

A. I do not remember of him making such a statement.

Q. Now, does it refresh your recollection as to whether or not there was any discussion of that kind when it appears from these letters that a claim had been made against your company that you were infringing Talon's patents? Did you talk about infringement when Mr. McKee was there?

A. No.

Q. He made no statement of any kind to you regarding infringement? A. No.

Q. And did you hear anything after that meeting [19] from Talon, whether it was Mr. McKee or somebody else in Talon?

A. I don't remember. I don't recollect.

Q. Did you ask him any questions on the subject of infringement? A. No.

Q. Did you ask him for permission to inspect Talon machines?

A. I did not, being he took me through the Talon plant about 1945, I believe it was, or 1944.

Q. That was before this correspondence.

A. I didn't ever drive back East to inspect Talon's plant.

Q. That was before this correspondence took place?

A. Yes. He invited me a few times before whenever I am in the East to come in and visit him. It wasn't exactly for inspection of the plant. I wasn't particularly interested.

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

Q. Mr. Loew, I show you Exhibit 3 attached to the answers by the Talon Company to interrogatories propounded on behalf of the defendant in this lawsuit, which is a written statement dated April 29, 1948, addressed to Mr. R. E. Meech, with a notation that copies had been sent to Mr. Ward M. Robinson and Louis Walker.

It is stipulated that Mr. R. E. Meech is house attorney for Talon, Inc.—— [20]

Mr. Lyon: He is attorney of record in this case.

Mr. Graham: And attorney of record in this case; and that Mr. Ward M. Robinson is Vice President of Talon, Inc., and that Mr. Louis Walker is President of Talon, Inc.

Q. (By Mr. Graham): I will ask you if that refreshes your recollection as to your discussions with Mr. McKee on the occasion of that visit?

A. Is it this paragraph——

Q. No, I would appreciate it if you would read the whole thing.

Mr. Lyon: While you are reading it, Mr. Loew, it will save us time if you will have in mind that I am going to ask you, if Mr. Graham doesn't, whether this writing set forth before you fairly summarizes the conversations and the things that took place during this meeting with Mr. McKee.

The Witness: (After reading the document referred to.) All that is correct that you have here.

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

I couldn't write it any better right at the time after the meeting.

Q. (By Mr. Graham): Your testimony is that this statement accurately represents the conversations you had with Mr. McKee?

A. That is right, to the best of my memory.

Q. Do you recall having any conversation with Mr. McKee on the occasion of that visit about a machine for making No. 2 zippers?

A. I wrote him about it, and I asked him if he could [21] send me some samples of special tape which is used on No. 2, and I told him that I was working on that, and he sent me the samples of tape which I have used in making these tests.

Q. Was there any discussion between you and Mr. McKee about the possible purchase of that machine by Talon?

A. Well, yes, I think he had talked about something like that.

Q. Did he express interest in it?

A. Yes, that is right.

Q. And when you wrote to him asking him for some tape for a No. 2 machine, did he send you the tape? A. Yes, he did.

Q. And did you have any further dealings with him after you had received the tape?

A. I most likely thanked him for it, and I don't know, I think I have sent him a sample of the zipper made on the tape, just to show him that I was working on that, but no selling or——

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

Q. No transaction ever developed?

A. No transaction, no.

Q. Mr. Loew, did you have any conversation with Mr. Philip Lipson of Union Slide Fastener earlier this year about the meeting that you and he had with Mr. David Silberman in 1948?

A. Yes.

Q. And did you furnish Mr. Lipson with any written [22] statement at that time?

A. Yes. He asked for a letter, a statement, to that effect, and we have given him a letter to that effect.

Q. I show you a letter dated February 4, 1952, addressed to Mr. Philip Lipson and purporting to bear your signature, and ask you if you can identify it?

Mr. Lyon: May I ask the purpose of this?

Mr. Graham: To refresh his recollection.

The Witness: Yes.

Mr. Graham: Do you want me to offer it for identification?

Mr. Lyon: Well, I am going to object to it.

Mr. Graham: Well, I won't offer it then. I will just ask him if it refreshes his recollection.

Q. (By Mr. Graham): Does that letter refresh your recollection as to any statement that may have been made by Mr. David Silberman concerning Mr. Silberman's patent?

A. Well, as I say, we were trying to offset with our patent or with my patent this square unit of

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

his patent which he claims he was using; and he, not in the exact words, expressed himself, as I said before, that no patent really right now will hold any water, so to say, or be strong, and that was more or less the conversation that I can recall.

Q. Well, did he make that statement specifically about his patent? A. Yes. [23]

Q. And does this letter refresh your recollection that Mr. Silberman may have made a statement about not enforcing his patent against your company if you didn't sell chain machines outside the United States?

A. Particularly in Europe, yes, that was so to say our meeting in there, and that everything was going around this question, that we shouldn't sell any machines and go in this territory where he has given a license or gets a royalty from his machines.

Q. On the occasion of the visit of Mr. McKee to your plant, did Mr. McKee make any statement to you that he was satisfied that your machines did not infringe the Talon patents?

A. I do not know the exact wording of that, but I think—I understood that the Talon people do not take suit against me—I understood from the conversation that they are not going to give me any trouble, so to say, in the patent situation.

Q. Well, did Mr. McKee say anything to cause that understanding?

A. Not exact words that I am not infringing on his patent or statements of that kind.

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

Q. You just got that impression?

A. I got that impression.

Mr. Graham: I think that is all. [24]

Cross Examination

Q. (By Mr. Lyon): Mr. Loew, when Mr. Silberman came to California and you met him at the Hollywood Roosevelt Hotel, you had breakfast with him there that morning, didn't you?

A. I did.

Q. That is right, and after you succeeded in calming him down a litlte bit over the matter of these remarks that Mr. Lipson had made, then you began discussing the slide fastener business; is that correct? A. Correct.

Q. And it is a fact, is it not, that as a result of that conversation no arrangement or agreement——

Mr. Graham: I object to the form of the question.

Q. (By Mr. Lyon): (Continuing) ——was made with Mr. Silberman as to what was going to happen in the future; is that correct?

A. We hadn't made——

Mr. Graham: I object to that. It calls for a conclusion on the part of the witness.

Mr. Lyon: Your objection has been noted. Well, I will reframe the question.

Q. (By Mr. Lyon): At that meeting did you reach an understanding, a firm understanding with Mr. Silberman, as to what you were to do and what

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

he was to do in the future with respect to slide fastener machines? [25]

Mr. Graham: I wish to make the same objection.

The Witness: No, we hadn't had an understanding at that time.

Q. (By Mr. Lyon): Now, I believe at one time you informed me that—and I think your testimony here is to the same effect, correct me if I am wrong—that you had some machines which you had proposed to sell in Europe, and that there was some talk with Mr. Silberman about his purchasing those machines from you; is that correct?

A. Correct.

Q. And subsequent to that meeting he went back to New York and called you on the telephone, did he not? A. Correct.

Q. And he asked you then if Mr. Lipson would be willing to bring those machines with him and come to New York, did he not?

A. Not to bring the machines, but he asked us to come to New York. He asked me or Mr. Lipson, as far as I remember that.

Q. And as a matter of fact you dropped it right there, didn't you, and neither of you went to New York?

A. It wasn't a definite date or anything. He asked us to come to New York, but he didn't have anything definite to give. We thought it was a waste of expense or something of that kind. If he would have had something definite he would

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

have offered it then, and he didn't offer us anything [26] definite. He asked us to come to New York.

Q. Now, on direct examination you started to make a remark and Mr. Graham objected to it on the ground it was not responsive. If my notes are correct, you stated that during this conversation with Mr. Silberman you agreed with him that you had adopted some of Mr. Silberman's ideas. Now, will you go on and finish that answer, if you please.

A. Well, I have developed a machine for the manufacturing of zippers on the same line that we are—that I have used before. I don't know what Mr. Lipson is using now and what exactly takes place. Now, these gentlemen understand that; but as I say, at that time I have used principally the same ideas that my patent was based on. However, being I have developed this patent in the time of war—in 1939 I lived in Canada and Canada was at war, and we couldn't get any material and we couldn't afford at that time to build a special machine. So I adopted a die which fitted into a punch press. Now, I used this idea, not knowing exactly that it was Mr. Silberman's on account of the patent of Mr. Silberman came out later when we had already this machine in operation.

Q. Mr. Loew, when you first started business at Union Slide Fastener in Los Angeles, Mr. Silberman was operating in Los Angeles, too, was he not, in the slide fastener business?

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

A. Not to my knowledge. [27]

Q. Wasn't there an organization in Los Angeles known as Cap-Tin? A. Yes.

Q. And wasn't that Mr. Silberman's business?

A. Not to my knowledge. I don't know. It was the business of Mr. Eisenberg, Mr. Tabah and Mr. Staff.

Q. I see. Was there an employee——

A. Maybe Mr. Silberman had some interest there. I have never looked up in the records to find out if he has an interest in this Cap-Tin business or not.

Q. And one of the employees of Cap-Tin at the time just prior to your setting up Union Slide Fastener was a gentleman by the name of Waldman, was it not? A. Yes.

Q. And Mr. Waldman subsequently became an employee of yours at Union Slide Fastener; is that correct? A. Correct.

Q. And Mr. Waldman assisted you, did he not, in the building of your first machines for Union Slide Fastener for the manufacture of slide fastener chain?

A. Not the first machine. I came over from Canada and I brought some machines with me, Mr. Lyon. However, this double machine, which Mr. McKee explains in here that he has seen four in operation, those Mr. Waldman assisted me in building.

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

Q. Did he have any drawings with him when he came to [28] Union Slide Fastener?

A. Maybe he did. I was mainly interested in that double unit in a machine instead of a punch press which was not the ideal thing for this machine.

Q. Now, on direct examination you stated under questioning by Mr. Graham that at this meeting with Mr. McKee he made no statement concerning infringement: is that correct?

A. That is correct.

Q. And you also stated that Exhibit 3 to the answers and interrogatories, which you read over, fairly and accurately summarizes the conversations that took place? A. That is right.

Q. Were there any conversations that took place during Mr. McKee's visit in April of 1948 to your plant at Union Slide Fastener, between Mr. McKee and Mr. Philip Lipson, that were taking place out of your presence?

A. If there were any different it was out of my presence.

Q. Well, did Mr. McKee leave you and go off with Mr. Lipson some place?

A. No. To my—no, unless it was another date or some other place, not to my knowledge.

Q. Then is it fair to say that Mr. McKee had no opportunity during the visit of April 15, 1948, to your plant to say something to Mr. Philip Lipson that you didn't [29] hear?

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

A. I think so, unless he made some remarks while I was just—when I walked away from him, but I do not presume that this took place.

Q. Now, you have had a lawsuit against Union Slide Fastener, have you not? A. Right.

Q. That lawsuit has been settled, has it not?

A. Right.

Q. That lawsuit was settled on or about February of 1952, wasn't it? A. Correct.

Q. And certain demands were made upon you as to what you should be required to do as a result of that—to effectuate that settlement, were they not?

A. Well, yes. Mr. Lipson asks to give him a statement to that effect, to the meeting with Mr. Silberman.

Q. And that statement is the statement that was used to refresh your recollection, being a letter written by you to Mr. Lipson dated February 4, 1952, and that was written as part of this settlement of this litigation with Mr. Lipson; is that correct? A. Well, yes, it was at that time.

Q. This gentleman I referred to a little while ago as Mr. Waldman, his first name was Morris Waldman; is that correct? [30]

A. Morris Waldman, that is right.

Q. I show you a photostat and ask if that is a picture of the unit you refer to when you speak of the double-headed machines that Mr. Waldman helped you to put together out at Union Slide

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

Fastener? A. Right.

Mr. Lyon: The photograph just identified by the witness is offered as Plaintiff's Exhibit A to this deposition.

Mr. Graham: Mr. Lyon, I think I'm going to have to object to that because there is no indication on it when it was taken, where it was taken, that it is an exact reproduction of any machine that the Union Slide Fastener Company may have used.

(Discussion off the record.)

Mr. Lyon: Well, it isn't too material. I will withdraw the offer.

I have no further questions.

Mr. Graham: I have a couple more questions here.

Redirect Examination

Q. (By Mr. Graham): Mr. Loew, regarding the statement which was shown to you to refresh your recollection as to any statement that may have been made by Mr. Silberman to the effect that his patent wouldn't hold water in court and that he wouldn't try to enforce it against you if you didn't sell any chain [31] machines in Europe, that was a correct statement of your memory?

A. Right; as far as I remember, that was the conversation.

Q. Now, did Mr. Silberman at any time say to you that he was considering bringing a suit against you for conspiracy for interfering with his sales of machines in Europe?

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

A. Mr. Silberman to me?

Q. Yes. A. Never.

Q. Now, when he made this telephone call to you from New York and asked either you or Mr. Lipson to come to New York in connection with the sale of 10 machines that you had manufactured, did you after that telephone call consult your attorney about the advisability of your going to New York? A. Our attorney?

Q. Yes. A. Not to my knowledge.

Q. You don't recall having done that?

A. No, I don't recall.

Q. Who was your attorney at that time, do you recall? Was it Mr. Solomon?

A. Well, we have used Mr. Solomon to draw up an agreement between Mr. Lipson and myself, and I have used him on a few occasions, but we didn't have any attorney. [32]

Q. Well, you didn't have any discussion with Mr. Solomon about that telephone call of Mr. Silberman?

A. I don't recall. I don't remember. Maybe I have mentioned to him that I have seen him. I don't remember.

Mr. Lyon: May we identify this Mr. Solomon a little bit more carefully?

Mr. Graham: Surely.

Mr. Lyon: Do you by any chance mean Mr. Solomon Kleinman?

The Witness: No. It is Solomon & Howie. I

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

think that is the firm name. They are in Hollywood.

Q. (By Mr. Graham): Do you remember Mr. Solomon's first name?

A. William Solomon.

Q. He is an attorney in Los Angeles?

A. Yes, if he is still practicing. I haven't seen him.

Q. He was at that time?

A. Yes, he was at that time.

Q. Did Mr. Silberman ever say that he was considering a suit against you for conspiracy based upon some help or assistance that you may have had from Mr. Waldman in manufacturing your machines?

A. I have never seen Mr. Dave Silberman since that meeting with Mr. Lipson in the Hollywood Roosevelt Hotel?

Q. Did he say anything about that at that time?

A. Not that I recall.

Mr. Graham: All right, that is all.

Recross Examination

Q. (By Mr. Lyon): In response to that statement of Mr. Silberman in April of 1948 wherein he stated, according to your letter of February 4, 1952, to Mr. Lipson, that he knew his patent wouldn't hold water and that he wouldn't enforce it against you if you stayed out of Europe, did you respond to that statement in any manner agreeing to such terms?

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

A. No, we hadn't had any agreement whatsoever at that time.

Q. Did you consider yourself bound to Mr. Silberman to refrain from selling machines in Europe? A. No.

Q. Now, this Mr. Waldman, did he ever tell you or did you ever otherwise learn that he had signed an agreement with the principals of the Cap-Tin Company or with the company itself which prohibited him from going to work for you?

A. Mr. Waldman when he offered himself to me to come to work for me, he told me that he is under—he is working for them; and I told him as long as he works for them, although I need a man of his caliber who knows the zipper business, on account he was working for a number of years in the zipper business, and I needed his help, however, I said as long as he is connected with another firm of course we [34] cannot enter into any understanding, any agreement.

When he came to work for me he told me that he was released of his agreement and he is free and he is looking for a job.

Q. Did you offer him any interest in the business at that time?

A. No. I told him I would need a man as a superintendent and if he would prove to be the caliber of man that I would need that I would eventually give him an interest—a bonus from the profits, an interest in the profits of the business.

Defendant's Exhibit "Q"—(Continued)
(Deposition of Sigmund Loew.)

Mr. Lyon: That is all.

Redirect Examination

Q. (By Mr. Graham): Mr. Loew, at the time you had your meeting with Mr. Silberman in April of 1948—it wasn't April, it was August of 1948—you had 10 machines that you had manufactured that you were considering for sale in Europe?

A. That is right, approximately.

Q. And you have testified that according to your memory Mr. Silberman told you that he would not enforce his patent against you if you didn't sell machines in Europe. That is correct, isn't it?

A. Well, he wanted us not to interfere with his arrangement that he had out there in getting royalties yearly or monthly, I don't know, but he felt that we are [35] doing him a lot more harm than what our total sales might amount to in Europe, his yearly income and so on.

Q. And when he made that statement to you, or after he made that statement to you, you asked him to try to sell those 10 machines for you, didn't you?

A. No. We told him, and Mr. Lipson, although we didn't have any definite sales at that time, but Mr. Lipson told me and told him that we have 10 machines sold there. In other words, we have potential buyers there, he believes he will be able to sell 10 machines there in Europe. So he voluntarily says, "If I buy these 10 machines from you,

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

I sell them for you to a certain place, another place where they will not interfere with my business, would you agree not to sell any more," and so on and so forth.

That was the conversation.

Q. What was your response to that?

A. Well, we had agreed, on account we needed the sale of 10 machines very badly and we shouldn't have any trouble there, and so forth, that between us at that time, as I understood Mr. Lipson, we would agree to that, providing of course we would have a definite agreement with him, which we didn't have.

Q. Were the machines, these 10 machines we have been talking about, ready at that time, ready for delivery to someone who might purchase them?

A. I don't think we had 10 machines ready then, no. [36] We had some under construction and we had—I don't remember, five or six in the plant that we have used ourselves. We have five I understand under construction.

Mr. Graham: All right, that is all.

Recross Examination

Q. (By Mr. Lyon): Mr. Silberman's proposal to you to buy these 10 machines was for the purpose of shipping them to some other place, such as South America and so on, so as to prevent them going to Europe? Is that your understanding of his purpose?

A. Well, he was going to place them somewhere.

Defendant's Exhibit "Q"—(Continued)

(Deposition of Sigmund Loew.)

He didn't mention where he would put them in or what he would do with them and so on.

Q. He wanted to prevent you from selling them in Europe, was that his purpose?

A. Yes. Maybe he wanted to give them to the same place, and being as they had to manufacture them anyway, maybe it was worthwhile to pay a little more and have these fellows out of the territory. But that was conversation only.

Mr. Lyon: That is all.

Redirect Examination

Q. (By Mr. Graham): This meeting with Mr. Silberman was had at Mr. Silberman's request?

A. He telephoned us, yes. I mean that is the way we have known that he is in town, he called us.

Mr. Graham: All right, that is all.

Mr. Lyon: That is all. We will stipulate that the deposition may be signed by the witness before any Notary Public.

Mr. Graham: So stipulated.

/s/ SIGMUND LOEW.

Subscribed and sworn to before me this 10th day of December, 1952.

[Seal] /s/ MAURICE N. NEWMAN,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Dec. 15, 1952.

DEFENDANT'S EXHIBIT "AI"

[Title of District Court and Cause.]

DEPOSITION OF WILBUR B. JAGER

Deposition of Wilbur B. Jager, called as a witness on behalf of the defendant, taken on Tuesday, the 25th day of November, 1952, at the hour of 10:00 o'clock A.M., at 5225 Wilshire Boulevard, 10th floor, Los Angeles, California, pursuant to Notice, before H. A. Singletary, a Notary Public in and for the County of Los Angeles, State of California.

Appearances: For the Plaintiff: Lyon & Lyon, by: Charles G. Lyon, Esq. For the Defendant: Solomon Kleinman, Esq., Fulwider, Mattingly & Babcock, William J. Graham, Esq., by: William J. Graham, Esq. [1*]

WILBUR B. JAGER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Mr. Graham: This deposition is taken pursuant to Notice, the original of which has been handed to the stenographer.

Direct Examination

Q. (By Mr. Graham): Mr. Jager, were you in the room when we talked with Mr. Loew about the nature of this proceeding? A. Yes.

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* Page numbers appearing at top of page of Original Deposition.

Defendant's Exhibit "AI"—(Continued)

(Deposition of Wilbur B. Jager.)

Q. You understand the nature of the proceeding? A. Yes.

Mr. Lyon: I think we can stipulate that this is the man who is intended to be referred to in your notice when you refer to him as William B. Jager, and I make no objection as to the informality.

Q. (By Mr. Graham): Mr. Jager, you are an employee of Talon, Inc.? A. Yes.

Q. And what position do you hold?

A. Western Regional Manager.

Q. And you were an employee of that firm in 1949? A. Yes.

Q. And did you hold the same position at that time? A. Yes. [2]

Q. Do you recall attending a meeting at the office of Talon, Inc., on September 30, 1949, between yourself and representatives of other slide fastener concerns?

A. I remember such a meeting. I wouldn't recall the date.

Mr. Graham: I think probably we can agree on that, can't we?

Mr. Lyon: I think so.

Mr. Graham: I think it is in the answer to the interrogatories. It says here during 1949, it doesn't pin down any date.

Mr. Lyon: Well, there was only one meeting of this type.

Mr. Graham: That is right.

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)

Q. (By Mr. Graham): You do recall a meeting in 1949 which you attended and which was attended by Mr. Eisenberg representing the California Slide Fastener Company, and Mr. Philip Lipson representing the Union Slide Fastener Company, and Mr. Napp of the Roxy Thread Company? A. Yes.

Q. And do you recall who arranged that meeting?

A. My recollection is that the meeting was arranged by Mr. Abramson of the Apparel Manufacturers Supply Company.

Q. And was that concern at that time either a jobber or an agent for Talon zippers?

A. Yes, they were jobbers. [3]

Q. Do you recall any person in particular—do you recall whether any person in particular presided at that meeting?

A. No, I don't recall that.

Q. Well, when the meeting convened did you make any statement to the meeting as to its purpose? A. No.

Q. Do you recall what the purpose of the meeting was?

A. Not particularly. There had been a lot of talk on the part of our jobber about the fastener situation in general, and as I recollect he called me at one time and wanted to know if there could be a meeting or a get together or something of that nature, and we happened to have some facili-

Defendant's Exhibit "A1"—(Continued)
(Deposition of Wilbur B. Jager.)

ties down in our building that were apropos, and so he wanted to know if they could use them.

Q. Did Mr. Abramson attend that meeting?

A. No, he didn't.

Q. Do you recall what was discussed at that meeting?

A. Well, there was a lot of conversation.

Q. Well, what was it about?

A. Well, it was about the fastener business in general, the product, the price, and generalities, so to speak, apropos to the business.

Q. Well, at that time was there considerable difficulty in the industry regarding the lowering of prices of [4] zippers?

A. Well, no more so than at a lot of other points in the history of the industry.

Q. Well, do you recall whether at that time——

Mr. Lyon: Have you got everyone that was present at this meeting?

Mr. Graham: I think we have.

Mr. Lyon: No, you have got only Eisenberg, Lipson, Napp and Mr. Jager. There were two other people present, weren't there?

Q. (By Mr. Graham): Do you recall who else was present at that meeting besides those named?

A. Mr. Detweiler, and there was another gentleman with Mr. Napp, whose name I don't recollect at the moment.

Q. Mr. Bogash? A. Correct.

Q. And Mr. Bogash is associated with Mr.

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)

Knapp? A. So I understand.

Q. In the business of Roxy Thread Company?

A. Yes.

Q. And Mr. Detweiler is an employee of Talon?

A. Correct.

Q. Do you recall whether at that time the Conmar Fastener Company had reduced its price considerably on 7-inch skirt zippers?

A. I don't remember. [5]

Q. Do you recall what the market was for skirt zippers at that time?

A. Well, I don't know exactly what you mean.

Q. Well, the relative prices charged by the different manufacturers for 7-inch skirt zippers?

A. Well, there was a fluctuation in price, always has been. You could possibly term it competitive.

Q. Well, when you say a fluctuation in price, there were zippers being sold at a price—7-inch skirt zippers being sold at a price below the price then being charged by Talon? A. Correct.

Q. In answer to Interrogatory No. 83 propounded by the defendant to Talon, the answers to which are dated May 5, 1952, which were signed by you, you answered in response to the question, the purpose of the meeting which we are now discussing was to discuss market conditions. Is that correct? A. Correct.

Q. That was the purpose of the meeting?

A. Correct.

Q. And in answer to Interrogatory No. 83-E

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)

which read: "State whether any discussion was had at that meeting concerning the then current prices of the standard 7-inch skirt zipper," your answer was yes. That is correct? A. Correct.

Q. Now, can you tell us what that discussion was, [6] in your own words? We just want to know what happened at that meeting, what was said by you and what was said by the others present.

A. Well, very frankly the meeting has been so long ago and there was so much said on the part of the people that attended it that I could never hope to remember particularly what was said. However, the general drift, as I recall, was that of the gentlemen present Mr. Napp did most of the talking, Mr. Eisenberg and Mr. Lipson chiming in relative to their own concerns, and we were more or less—when I say we, I mean Mr. Detweiler and myself—were listening to a discussion that revolved around skirt fasteners and then jumped into other styles of fasteners and prices that the different firms represented there were selling for, and even going into maybe some instances that might have to do with an account or accounts. There was a lot of conversation, but I can't——

Q. Well, the nature of the conversation is what I'm trying to get at.

A. Well, I think the nature of it had to do with the price situation and competitive conditions ex-

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)

isting in the market and quite a few accusations, rather pointedly in some cases, between some of the firms represented in the room about what they were individually doing and selling their fasteners for.

Q. What accusations were made by whom? [7]

A. By the people present.

Q. Directed to whom? A. Each other.

Q. None directed to Talon? A. No.

Q. Was there any discussion at the meeting about the Wilzip zipper?

A. The name was brought up.

Q. What else was said about it?

A. Well, frankly I can't remember what was said about Wilzip specifically.

Q. Well, was anything said about Talon introducing the Wilzip zipper on the Pacific Coast?

A. Well, the Wilzip fastener had already been introduced on the Pacific Coast.

Q. By whom? A. By Talon.

Q. And is the Wilzip fastener a less expensive fastener than the standard Talon fastener?

A. Yes.

Q. How much less expensive is it? I mean, what did it at that time sell for, if you recall?

A. I don't recall what the price was of the fastener at that time.

Q. If I mentioned 4½ cents would that refresh your recollection? [8]

A. That could have been the price. I could check it from office records, what the price was of

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)
the product at that time, but I can't recall at this moment just what the price structure was.

Q. Did you make any statement to the others present that Talon might reduce the price of the Wilzip zipper if the other manufacturers reduced their prices any further than they had already done? A. Not that I recall.

Q. You say that the Wilzip zipper had been introduced on the Pacific Coast. Do you recall approximately the time when that had been done?

Mr. Lyon: If I may make a statement there, I think that is a mistake on the part of the witness. I checked this matter with the warehouse records Friday of last week and the first shipment of zippers into this area was in April of 1952, and I think the witness is confused between the time when he executed the answers to the interrogatories and the time of this meeting, because—I would like to have the record straight, because in answer to Interrogatory 83-F he stated in May of 1952 that Wilzip had not been shipped into this competitive market as of that date. So there is an obvious inconsistency between that and the statement that they had already been shipped in here in 1949.

Q. (By Mr. Graham): Now, you have just heard the statement of your counsel, Mr. Jager, that in answer to [9] Interrogatory No. 83-F you stated that as of May 5, 1952, the date on which you signed these answers, that Wilzip zippers had

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)

at no time been shipped into this competitive market, obviously referring to the Los Angeles market, and in answer to a question that I asked you previously you said that at the time of this meeting in 1949 the Wilzip zippers had already been introduced to the Pacific Coast. Do you wish to clarify your answer?

A. Well, I think what my thinking was when I say "introduced," I think there was a question previously there, did the name Wilzip come up at the meeting, or some such statement. I meant introduced from the standpoint that the name was known to the trade, because Talon had such a fastener and no doubt the name was familiar.

Q. Well, do you know whether persons representing other concerns or concerns other than those represented at the meeting had been invited to the meeting but did not attend? A. I don't know.

Q. And you don't recall any discussion of the sale of Conmar zippers at that time at a very low price? A. Not that I can remember.

Q. Do you recall that there was any discussion about discounts and premium sales being made by the various manufacturers?

A. I think there was some discussion along those [10] lines, yes.

Q. Well, did you on behalf of Talon make any objection to that type of transaction?

A. I don't remember specifically that I did, other than there was, as I recollect, some discussion

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)

about fasteners being sold other than at published price lists, and as I remember, there was a lot of conversation which I couldn't remember now.

Q. Well, at that time Talon was not offering any special discounts or premiums on the sales of its zippers? A. No, sir.

Q. Did the representatives of any of the firms present make any complaint about advertisements that had been published by Talon giving publicity to the names of some of their chief customers?

A. Not that I recall.

Q. Was there any discussion about the sale of the Wilzip zipper in the Eastern part of the United States? A. Not that I remember.

Q. Was there any discussion about smaller firms, firms smaller than Talon, going out of business on the Eastern Coast after the sale or after the placing on the market there of the Wilzip zipper?

A. I don't remember any such discussion or statements.

Q. At the time of this meeting, Mr. Jager, did you [11] know or had you been informed by any of your superiors that the Talon organization had acquired a patent issued to David Silberman for a zipper manufacturing machine?

A. No, I have no information at all on anything like that.

Q. Well, did you make any statement at the meeting that you and your associates would not

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)

like to have the Wilzip zipper sold in this market, that is the Pacific Coast market, in competition with Talon zippers?

A. I don't remember any such statement.

Q. Did you have any instructions from your superiors concerning this meeting that was held in 1949? A. No.

Q. Did you inform them that such a meeting had been held? A. No.

Q. And there isn't any report of the meeting or the discussions that were had at the meeting?

A. Not that I know of.

Q. You didn't prepare any? A. No, sir.

Q. Did any of those present at the meeting complain that they were suffering from a price war in the zipper industry?

A. It would seem to me that they were all doing a lot of complaining and accusing of each other, about what [12] they were suffering at each others hands, yes.

Q. No complaints against Talon? A. No.

Q. Did Talon have any complaints against them? A. No.

Q. Was any statement made by anyone present at the meeting that his firm would sell zippers as low—that is 7-inch skirt zippers—as low as 2 cents each if he had to?

A. I don't recall that exact wording.

Q. Well, what do you recall about that?

A. I recall a statement to mind made by Mr.

Defendant's Exhibit "A1"—(Continued)
(Deposition of Wilbur B. Jager.)

Napp, that if he had to he would put a gold brick in every box of zippers, if he had to to sell them.

Q. Do you recall to whom he made that remark? A. To the general group.

Q. Now, you said in answer to a previous question that Mr. Lipson did some talking at this meeting. Do you recall the nature of what he said?

A. Oh, I think, as I recall, it was along the same lines that the other gentlemen, Mr. Eisenberg and Mr. Napp, were talking. It had to do with the price of fasteners.

Q. Did he say anything about his own prices?

A. He talked about his own prices, but just what he said I don't remember. I couldn't say specifically.

Q. Did Mr. Lipson make any statement to the effect that he wouldn't like to see any price war in the zipper [13] industry? A. He may have.

Q. Did he say anything about whether or not he had been offering special premiums or discounts?

A. Well, as I remember there was a complete denial on the part of the three local firms represented that any of them were doing anything along that line.

Q. Now, you also said that Mr. Eisenberg had something to say at the meeting. Do you recall what it was that he said?

A. Well, not specifically in so many words,

Defendant's Exhibit "AI"—(Continued)
(Deposition of Wilbur B. Jager.)

again generalities on the same subjects of prices and products.

Q. Did he complain about the competition being offered by Conmar?

A. I can't remember whether he complained about—he complained about competition in general, but I can't remember whether he complained specifically about Conmar.

Q. Do you know whether a representative of Conmar was invited to the meeting?

A. Not to my knowledge.

Q. Do you recall what Mr. Bogash had to offer, what he said at the meeting, if he said anything?

A. I don't recall Mr. Bogash saying anything. I don't remember at all.

Q. And have you told us everything that you recall that Mr. Napp may have said? [14]

A. Well, the one statement that I mentioned, that would stand out in my mind. Aside from that, I think Mr. Napp did a lot of talking but again it was along the same lines I previously described from others. Specific statements, no.

Mr. Graham: I think that is all I have.

Cross Examination

Q. (By Mr. Lyon): Do you recall an incident in which Mr. Napp handed out his price cards to the people that were present and said, "These are my prices?" A. Yes, I do.

Mr. Lyon: That is all.

Mr. Graham: That is all. We will stipulate that the deposition may be signed before any Notary Public.

Mr. Lyon: So stipulated.

/s/ WILBUR B. JAGER.

Subscribed and sworn to before me this 4th day of Dec., 1952.

[Seal] /s/ M. S. MUSANTE,

Notary Public in and for the County of Los Angeles, State of California. My Commission Expires May 31, 1956. [15]

[Endorsed]: Filed Dec. 8, 1952.

DEFENDANT'S EXHIBIT "AJ"

[Title of District Court and Cause.]

DEPOSITION OF C. F. DETWEILER

Deposition of C. F. Detweiler, called as a witness on behalf of the defendant, taken on Tuesday, the 25th day of November, 1952, at the hour of 10:00 o'clock A.M., at 5225 Wilshire Boulevard, 10th floor, Los Angeles, California, pursuant to Notice, before H. A. Singeltary, a Notary Public in and for the County of Los Angeles, State of California.

Appearances: For the Plaintiff: Lyon & Lyon, by: Charles G. Lyon, Esq. For the Defendant: Solomon Kleinman, Esq., Fulwider, Mattingly & Babcock, William J. Graham, Esq., by: William J. Graham, Esq. [1*]

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* Page numbers appearing at top of page of Original Deposition.

Defendant's Exhibit "AJ"—(Continued)

C. F. DETWEILER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Mr. Graham: This deposition is taken pursuant to Notice, the original of which has been handed to the stenographer.

Direct Examination

Q. (By Mr. Graham): Mr. Detweiler, will you give us your full name and address, please?

A. Charles F. Detweiler, 5447 Zelzah, Encino, and that address is good for the next maybe 20 days and then it will be 5100 Woodley, Encino.

Q. Mr. Detweiler, you were present in the room when we explained to the witness Mr. Loew the nature of this proceeding? A. I was.

Q. And you understand it? A. I do.

Q. You are an employee of Talon?

A. Correct.

Q. And what is your position?

A. Retail Promotional Manager, Western Region.

Q. And what was your position in 1949?

A. Southwestern District Sales Manager.

Q. Do you recall attending a meeting at the office [2] of Talon in 1949 about the month of September which was attended by Mr. Robert Eisenberg, Mr. Napp, Mr. Philip Lipson, Mr. Abe Bogash and Mr. Jager of your firm?

A. I do.

Q. Do you know who arranged that meeting?

Defendant's Exhibit "AJ"—(Continued)

A. Yes, Julius Abramson whose name you did not mention but who was also present.

(Deposition of C. F. Detweiler.)

Q. It is your recollection that Mr. Abramson was also present at that meeting? A. He was.

Q. And what concern is he associated with?

A. Threads, Inc. is the name of the—I may be in error on his being present. He engineered the deal so I took it for granted that he was there,—Threads, Inc. or Apparel Manufacturers Supply. They operate under two names.

Q. And does either of those names have some business relations with Talon?

A. At that time they were a jobber for Talon, a jobber to the women's ready-to-wear field or trade.

Q. And do you know whether there were other concerns other than those represented at the meeting who had been invited to it?

A. That I do not know.

Q. Now, it was held at the Talon office, and where was that office at that time?

A. 18th and Hill Streets in Los Angeles. [3]

Q. And was the meeting held in any special room in that office?

A. It was held in a conference room that is part of our office set-up down there. The reason for it being held there was that that was the only meeting place for that special group where they wouldn't have to sit on packing cases.

Q. Zipper packing cases?

A. That is about it, yes.

Defendant's Exhibit "AJ"—(Continued)
(Deposition of C. F. Detweiler.)

Q. And did anyone in particular preside at the meeting?

A. Everybody concerned had their two bits worth. It was kind of a crying session, if you want to put it that way. I don't know that anyone did preside.

Q. Did anyone open the meeting and explain the purpose of it?

A. I imagine that Mr. Jager did.

Q. And do you recall the purpose of the meeting, that was stated at that time?

A. Yes. To put it very frankly, it was an attempt to find out who was calling who who.

Q. You mean it was a session to air complaints?

A. That is right, air complaints and call a spade a spade. Customers were quoting prices supposedly quoted by one local manufacturer. The local manufacturer was telling the representative of some other manufacturer that he never [4] in the world quoted such a price, and frankly nobody knew who to believe, and we were sitting on the sidelines watching a pretty good show.

Q. When you say customers, customers of whom?

A. Customers of all of the local zipper manufacturers. By customers, I mean garment manufacturers, handbag manufacturers.

Q. Were any of these garment manufacturers also customers of Talon?

Defendant's Exhibit "AJ"—(Continued)
(Deposition of C. F. Detweiler.)

A. Yes, most of them.

Q. And had they made any complaints to Talon?

A. No. We did not get into any of the cat and dog fight price angles.

Q. Well now, I think maybe you misunderstood my question. I don't mean complaints by those present at the meeting but complaints of purchasers of zippers, apparel manufacturers. Did any of them complain to Talon about the situation in the zipper industry? A. Yes, continually.

Q. And what was the nature of their complaints?

A. The nature was that they couldn't sell Talon zippers at Talon list and afford to continue carrying Talon fasteners because they were being undersold by everybody else in the market, and that at that time there seemed to be little or no rhyme, reason or pattern to the prices that were being quoted. [5]

Q. Do you recall at that time the Conmar Company was selling zippers in this market at a very low price, conducting a sort of closeout sale as it were of 7-inch skirt zippers?

A. I am reasonably sure they were. That is a habit of theirs, but it was nothing that ever caused us any great concern because it was always a one-shot attempt at something they found hard to get.

Q. But you were concerned about the complaints of customers?

Defendant's Exhibit "AJ"—(Continued)
(Deposition of C. F. Detweiler.)

A. You might say our jobber was concerned. The only complaint we ever got, I might add, is that our prices were too high, and the prices were usually so far out of line that there was no quibbling about it. They were too high and that usually ended it right there.

Q. Was there any discussion at the meeting of the Wilzip zipper? A. Yes.

Q. Do you recall what that discussion was about?

A. I don't recall anything other than it was a possible for the future.

Q. Was any statement made at the meeting that the Wilzip zipper might be introduced in the Pacific Coast market?

A. The remark was made that the Wilzip fastener would probably be introduced on the West Coast in the future.

Q. And was any reference made to the effects of the [6] introduction of the Wilzip zipper in the Eastern States, in relation to its effect upon smaller manufacturers? A. Not that I remember.

Q. Was any statement made that the Talon representatives in Los Angeles would not like to see the Wilzip zipper introduced to this market?

A. Yes.

Q. Do you recall who made that statement?

A. Mr. Jager.

Q. Did he explain why he wouldn't like to see it?

A. There were several reasons. One was ques-

Defendant's Exhibit "AJ"—(Continued)
(Deposition of C. F. Detweiler.)

tionable quality at that time, and while this is probably not the exact words again of these statements——

Q. Just the substance.

A. (Continuing) ——it would put us right in the middle of the dogfight that our local competition was in.

Q. Was most of the discussion about the 7-inch skirt zippers and their prices?

A. The 7-inch skirt fastener was the focal point.

Q. And was there any discussion about some of the manufacturers offering premiums and discounts in the sale of their zippers?

A. No. There were I think I can safely say whining insinuations that it was being done, but no open discussion on it.

Q. Was any statement or any complaint made by any [7] of the other manufacturers that Talon was in effect giving premiums by giving prominent publicity in newspaper advertisements to their principal customers?

A. I do not remember any mention of that.

Q. Do you recall the substance of anything that may have been said by Mr. Napp of the Roxy Thread Company?

A. Mr. Napp said a great deal. In fact, he made with most of the conversation that was made at that meeting, but Mr. Napp said he was in the zipper business to stay—this kind of stuck—and he intended to stay in it and he hoped that staying in the

Defendant's Exhibit "AJ"—(Continued)
(Deposition of C. F. Detweiler.)

business wouldn't take all he had ever made out of the business.

Q. Do you recall anything else that Mr. Napp may have said—just the substance of it. I know you can't remember the exact words.

A. There was one outstanding wisecrack, which I believe should be taken as that, that he was going to sell zippers if he had to put a nugget in each box, if that is the one we are digging for.

Q. Did he refer to a gold nugget?

A. Yes. He was talking quite a lot in regard to his gold bricking endeavors and activities.

Q. Do you recall anything else that Mr. Napp may have said?

A. Nothing other than that Mr. Napp definitely stated that it was his sincere desire to be open and [8] aboveboard, and to be on record, he was perfectly willing to give everyone present a copy of his standard and published price list, which he did.

Q. Now, did Mr. Lipson have anything to say at that meeting that you recall?

A. Mr. Lipson had very little to say at the meeting.

Q. Well, do you recall what he said?

A. No, I don't.

Q. Do you recall what Mr. Eisenberg of the California Slide Fastener Company said?

A. The only thing I recall from Mr. Eisenberg was his sincere hope that he would be left alone with the few customers he had, and that no one

Defendant's Exhibit "AJ"—(Continued)
(Deposition of C. F. Detweiler.)

would try to undershoot his present prices on garment bags.

Q. Do you recall whether or not he was selling or his firm was selling 7-inch zippers a that time?

A. They were trying to. I don't think they were enjoying very much success.

Q. Do you recall what his company's price was on 7-inch zippers at that time?

A. Without attempting to be facetious, I would say it was whatever he could get.

Q. Do you recall what Mr. Napp's list price was? A. 4.5, 4.5 a hundred.

Q. Four dollars and a half a hundred?

A. Yes. That I might add was at that time an asking [9] price, and it was a sharpshooting era.

Q. Do you recall at that time what Talon's price was for its standard 7-inch zipper?

A. 5.90 a hundred.

Q. Was any statement made on behalf of Talon that Talon had no particular objection to a 4½ cent price or a 4.50 price per hundred, provided it didn't go any lower?

A. I do not believe that—let me find the right words here. I'm not much of a quoter.

Q. Take your time.

A. I do not believe that there was any specific price or lower angle to it as much as an established price that would be lived up to. We have always expected to get a premium for the Talon fastener. We never expected to sell it at the same price as

Defendant's Exhibit "AJ"—(Continued)
(Deposition of C. F. Detweiler.)

the bulk of the—may I say run of the mine, without being disparaging.

Q. Do you recall whether you had decided upon any price which you would like to have established as a firm price for zippers sold by the other manufacturers? A. No.

Q. Prior to that meeting had the standard 7-inch Talon fastener been sold for less than $5 a hundred?

A. By the standard Talon fastener you mean the fastener——

Q. 7-inch skirt fastener.

A. Which was just mentioned as selling for 5.9? [10]

Q. That is correct.

A. God, I'm not a walking price book, but I would say no. That was a low for the 7-inch fastener with the automatic slider. De did have an all aluminum pin locking skirt fastener that was sold at five cents.

Q. Was that a 7-inch fastener?

A. That was a 7-inch fastener with a pin lock slider.

Mr. Lyon: And by five cents, you mean $5 a hundred?

A. $5 a hundred. That was an attempt on the part of Talon to produce a fastener that could be bought by the low end manufacturer.

Q. (By Mr. Graham): Do you know what the Wilzip fastener sold for in the Eastern States at that time? A. I have no idea.

Defendant's Exhibit "AJ"—(Continued)

(Deposition of C. F. Detweiler.)

Q. Did your superiors furnish you with any price lists or suggested price lists for the Wilzip fastener, at that time?

A. Not that I had any knowledge of. We had no stock, we had no promise of delivery better than 30 days, and the few orders that we took on Wilzip were for the long lengths sold to Sunshine Manufacturing which we finally took back and turned back to the Cleveland source for credit. We had no demand for them.

Q. Do you recall when that sale was made? Was it at or prior to this meeting? [11]

A. I would say it was prior to that meeting.

Q. And the sale was made here in Los Angeles?

A. Yes.

Q. So that at the time of the meeting the Wilzip zipper had been sold in the Pacific Coast market?

A. Only for that one use, which was a very cheap, low end garment bag. The lengths were 26, 30 and 36 inches.

Q. And do you recall what it sold for?

A. I have not the slightest recollection. All I know is it didn't stay sold.

Q. It was a lower price than the standard Talon zipper or the pin lock zipper? A. Yes.

Q. Do you remember whether it was less than four cents or $4 a hundred?

A. That wouldn't be a fair comparison because of the difference in the lengths of the fasteners. You are talking about an average of 30 inches against a 7-inch fastener.

Defendant's Exhibit "AJ"—(Continued)
(Deposition of C. F. Detweiler.)

Q. That is right.

A. If I'm not mistaken, that fastener was priced higher than it could have been bought locally, but because it was produced by remote control by Talon it held quite a bit of interest to the manufacturer in question.

Q. At the time of this meeting had you been informed by your superiors that Talon had acquired a patent [12] issued to David Silberman, some time prior to the meeting?

A. No. I might inject the thought that I am just a lowly salesman and would have no knowledge of what management was doing with regard to something like that.

Q. Was any report of this meeting given to your superiors? A. Not that I know of.

Q. Was there ever any written digest of what took place at the meeting made by your concern?

A. Not to my knowledge.

Q. When were you first informed that this meeting was going to take place?

A. A matter of several days before it occurred.

Q. And by whom were you informed?

A. Mr. Jager. I had heard the hope expressed that there might be such a meeting from Mr. Abramson and Mr. White of Apparel who were my customers.

Q. That is the same Mr. Abramson you referred to before? A. That is right.

Q. And the company is the Apparel Manufacturers Supply Company? A. Yes.

Defendant's Exhibit "AJ"—(Continued)

(Deposition of C. F. Detweiler.)

Q. Now, do you recall anything else that Mr. Jager may have said at the meeting that you haven't already told us? [13] A. No.

Q. Do you recall whether any statement was made by anyone at the meeting that if the 7-inch skirt zippers were sold for less than $4.50 per hundred there would be a loss on the sale rather than a profit?

A. I believe that Mr. Napp voiced that thought.

Q. And do you recall whether Mr. Jager said anything about that?

A. No, I do not. I don't know how he could because he certainly is not familiar with the manufacturing costs of Union, Calzip and Roxy.

Mr. Graham: I think that is all I have.

Mr. Lyon: You are excused, Mr. Detweiler.

Mr. Graham: And the same stipulation, that the deposition may be signed before any Notary Public?

Mr. Lyon: So stipulated.

/s/ CHARLES F. DETWEILER.

Subscribed and sworn to before me this 15th day of December, 1952.

[Seal] EDNA B. MOLOFF,

Notary Public in and for the County of Los Angeles, State of California. My Commission Expires Dec. 6th, 1956. [14]

[Endorsed]: Filed Jan. 8, 1953.

DEFENDANT'S EXHIBIT "AK"

DEPOSITION OF ROBERT EISENBERG

Deposition of Robert Eisenberg, called as a witness on behalf of the defendant, taken on Tuesday, the 25th day of November, 1952, at the hour of 3:00 o'clock p.m., at 5225 Wilshire Boulevard, 10th floor, Los Angeles, California, pursuant to Notice, before H. A. Singeltary, a Notary Public in and for the County of Los Angeles, State of California.

Appearances: For the Plaintiff: Lyon & Lyon, by Charles G. Lyon, Esq. For the Defendant: Solomon Kleinman, Esq., Fulwider, Mattingly & Babcock, William J. Graham, Esq., by William J. Graham, Esq. [1]*

ROBERT EISENBERG

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Mr. Graham: This deposition is being taken pursuant to Notice, the original of which has been handed to the stenographer.

Direct Examination

Q. (By Mr. Graham): Mr. Eisenberg, will you please give us your full name and address?

A. Robert Eisenberg, 201 South Spaulding Drive, Beverly Hills.

Q. Mr. Eisenberg, were you present in the room this morning when I explained the nature of this proceeding to the other witnesses who have testified? A. No.

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* Page numbers appearing at top of page of Original Deposition.

Defendant's Exhibit "AK"—(Continued)

(Deposition of Robert Eisenberg.)

Q. This is a deposition that you will give under oath. The questions and answers will be recorded by the stenographer and transcribed, and your deposition will be submitted to you for any corrections and for your signature before a Notary. Mr. Lyon represents Talon, Inc. and has the right to make any objections to questions that he may think are improper. He also has the right to cross examine you.

Now, do you understand what the nature of the proceeding is from that statement? [2]

A. Yes.

Q. Do you recall attending a meeting at the office of Talon in the month of September, 1949?

A. I don't remember the month but I attended a meeting there.

Q. Was it the latter part of 1949?

A. That is right, sir.

Q. And do you remember who else was present at that meeting?

A. When I arrived there there was Mr. Jager, Mr. Detweiler, Mr. Napp, Mr. A. Bogash and Mr. Lipson.

Q. And do you know who it was arranged for that meeting?

A. I am not positive but I think it came out of the office of their jobber, of Talon's jobber. Either Mr. Whitesenfeld or Mr. Abramson I think arranged for the meeting.

Defendant's Exhibit "AK"—(Continued)
(Deposition of Robert Eisenberg.)

Q. Now, is the name of that jobber Apparel Manufacturers Supply Company?

A. That is right, sir.

Q. Do you recall whether anyone presided at the meeting?

A. To the best of my recollection I think Mr. Jager did.

Q. And did Mr. Jager make any statement as to the purpose of the meeting? [3]

A. Well, there were many statements thrown back and forth.

Q. I mean at the beginning before the meeting got under way?

A. I wasn't there. I just got in when they called the meeting. I believe I arrived the last one.

Q. I see; and did you represent any firm at that meeting? A. California Slide Fastener.

Q. Were you an officer of that firm at that time?

A. I was.

Q. What was your position?

A. Secretary and Treasurer.

Q. Now, can you tell us what subjects were discussed at the meeting?

A. Well, primarily the prices of zippers.

Q. Any particular type zipper?

A. Those in question were what we called a skirt zipper, 7-inch, pin lock.

Q. And do you recall what Mr. Jager said about the price of the 7-inch zipper?

A. The smaller manufacturers, of which I was

Defendant's Exhibit "AK"—(Continued)

(Deposition of Robert Eisenberg.)

one, were selling 7-inch skirt zippers for 4½ cents. Talon's price at the time for a pin lock zipper such as was the equivalent of ours was selling for five cents. He said that he understood there was a lot of chiseling going on. By that, [4] there were premiums given, inside prices, and so forth. They had —that is, they, Talon, had a cheaper zipper in the East called Wilzip.

Q. Did Mr. Jager say that?

A. Yes, definitely.

Q. That was his statement?

A. Yes. He said, "You know what is going on in the East with the Wilzip zipper." He says, "I don't want to bring it into town although," he said, "the company may do so. If the differential will remain about one-half a cent——" In other words, if we kept our price at 4½ cents and Talon at five cents, he claimed that they would stand this reduction because of their advertising, their name and reputation.

Q. Did he say what was happening in the East with respect to the Wilzip zipper?

A. Yes. I forget exactly how much. He said Wilzip was being sold for 3.75 or three and a half, I don't recall exactly how much, and that they would be compelled to bring it in if the chiseling kept on.

Q. When you say "bring it in," bring it in where?

A. Into the Los Angeles area. They were losing

Defendant's Exhibit "AK"—(Continued)

(Deposition of Robert Eisenberg.)

a great deal of their skirt trade and they weren't going to just stand by and do so.

Q. Did he say anything as to the effect of the sale of the Wilzip zipper in the East with respect to smaller manufacturers there? [5]

A. Yes. He definitely pointed out that it was raising havoc there, a number of them were dropping by the wayside and going out of business because they couldn't meet the price they were selling it for.

Q. Was any complaint made by Mr. Jager about premium sales and discount sales? A. Yes.

Q. By the smaller manufacturers?

A. Yes, he heard that they were being done.

Q. And he complained about it?

A. He complained about it, yes, and one of the other men at the meeting questioned Mr. Jager or rather told Mr. Jager that they were offering all sorts of inducements in advertising and that was Talon's form of premium.

Q. Do you remember who said that?

A. Yes, Mr. Napp.

Q. Now, after these statements were made by Mr. Jager did you make any response to what he had said? A. Yes, I did.

Q. Will you please tell us the substance of what you said to him?

A. At that time a firm by the name of Conmar Zipper were also offering premiums in the manner of closeouts. In other words, they would say they

Defendant's Exhibit "AK"—(Continued)
(Deposition of Robert Eisenberg.)

had 10,000 or 20,000 zippers of a color or size to close out and they will close it out at below the market price at that time. [6]

So I told Mr. Jager that that was the type of competition that I had to contend with and therefore I would have to meet competition and not sit by and see the market run away from me.

Q. Did Mr. Jager reply to that statement?

A. He says he knew about it, he had heard about it.

Q. Do you recall what statements were made by Mr. Napp?

A. I remember in the discussion one particular statement that was made, that Talon or California Slide or anybody else couldn't tell him what to sell his zipper for. If the marked called for it and he wanted to sell it for two cents, he was going to do it. That is when the question arose about the premium.

Q. Did Mr. Napp have anything to say about the Wilzip zipper? A. In what respect?

Q. Well, when that discussion was taking place did he offer any comments?

A. No, nothing in particular except that he was going to sell his zipper to compete with anyone.

Q. Did Mr. Jager make any statement about any communication he had received from the Conmar Company concerning this meeting?

A. I believe that a Conmar man was asked to attend the meeting, I believe Mr. Tarshes was then the General [7] Manager of the Los Angeles Divi-

Defendant's Exhibit "AK"—(Continued)
(Deposition of Robert Eisenberg.)

sion, and for some reason or other he couldn't attend or he wasn't there, I don't know.

Q. Do you recall what statements were made by Mr. Lipson during the discussion about the Wilzip zipper and the prices of zippers on the Coast?

A. Mr. Lipson said at that time that he had not chiseled or cut prices regardless of any zipper that came into the market, up to that time; that in order to come out whole, as he put it, he would have to make a cheaper zipper and not give them the quality that he tried to maintain.

Q. Did he say what he was selling his 7-inch skirt zipper for?

A. Yes, he was selling his 7-inch skirt zipper at that time at 4½ cents.

Q. And did Mr. Jager make any statement as to that price that Mr. Lipson was selling his zipper at?

A. I don't quite understand you.

Q. Well, did he say he approved of that price or disapproved of it?

A. Well, he said if we kept it at 4½ he wouldn't bring the Wilzip zippers in as long as he could help keep it out of town, but if there was any — if he heard there was any more chiseling going on he was going to bring it in.

Q. Did Mr. Jager say anything about the price that Talon was selling its 7-inch skirt zipper at at that time?

A. Their pin lock, I believe, was selling at five

Defendant's Exhibit "AK"—(Continued)

(Deposition of Robert Eisenberg.)

[8] cents, and their automatic lock was somewhere around six cents or 6½ cents. I am not sure.

Q. Now, you have appeared to testify today pursuant to a subpoena served upon you; isn't that correct? A. Correct, sir.

Q. Now, at or about the time of this meeting did the California Slide Fastener Company sell 7-inch zippers at less than 4.50 per hundred?

A. Yes.

Q. What price were they sold at?

A. They were sold at 4.50, with a discount, less a special discount.

Q. And do you know at that time what the Conmar closeout zippers were selling for?

A. Only by hearsay, sir.

Q. Well, it was below 4.50 per hundred?

A. Yes. Some people claim it went as low as 3.75. I had never seen a bill and I didn't know, only by word of month.

Q. Do you recall what your net price was after figuring a discount, when you sold your zippers for 4.50 a hundred with a discount?

A. I believe it was about 4.30.

Mr. Graham: I think that is all, Mr. Eisenberg.

Cross Examination

Q. (By Mr. Lyon): Mr. Eisenberg, what is your present occupation?

A. I am now employed by Union Slide Fastener.

Defendant's Exhibit "AK"—(Continued)

(Deposition of Robert Eisenberg.)

Q. How long have you been employed by Union Slide Fastener?

A. Oh, I believe during July of this year, of 1952.

Q. And in what capacity?

A. I am a Sales Manager.

Q. This meeting that was held in the latter part of 1949, was that meeting suggested by you?

A. No.

Q. Mr. Napp has testified that you telephoned him and invited him to the meeting. Is that a fact?

A. I might have—yes, I believe it is so.

Q. When you were selling your 7-inch skirt zipper at a discount so as to net 4.30 a hundred, can you tell me what your cost figures were per hundred?

A. I think it is a little difficult to tell you now what they were at that time, sir.

Q. Have you any idea? A. Yes.

Q. Would you care to——

A. I think they must have been around 4½ cents at the time.

Q. So you were actually selling at a loss; is that [10] a fact? A. Yes.

Mr. Lyon: That is all.

Mr. Graham: I think that is all. The same stipulation, that the deposition may be signed before any Notary Public.

Mr. Lyon: So stipulated. [11]

[Endorsed]: Received Dec. 6, 1952.

DEFENDANT'S EXHIBIT "AL"

[Title of District Court and Cause.]

DEPOSITION OF ISADORE O. NAPP

Deposition of Isadore O. Napp, called as a witness on behalf of the defendant, taken on Tuesday, the 25th day of November, 1952, at the hour of 2:00 o'clock p.m., at 5225 Wilshire Boulevard, 10th floor, Los Angeles, California, pursuant to Notice, before H. A. Singeltary, a Notary Public in and for the County of Los Angeles, State of California.

Appearances: For the Plaintiff: Lyon & Lyon, by Charles G. Lyon, Esq. For the Defendant: Solomon Kleinman, Esq., Fulwider, Mattingly & Babcock, William J. Graham, Esq., by William J. Graham, Esq. [1]*

ISADORE O. NAPP

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graham): Mr. Napp, will you please state your full name and address?

A. Isadore O. Napp, 10354 Wilshire Boulevard. Do you want my business address, too?

Q. No, that is all right. What is your occupation at the present time, Mr. Napp?

A. We manufacture zippers and sewing thread.

Q. And do you do that under a firm name?

A. Yes, Roxy Company.

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* Page numbers appearing at top of page of Original Deposition.

Defendant's Exhibit "AL"—(Continued)

(Deposition of Isadore O. Napp.)

Q. Before we go further I would like to have you understand the nature of this proceeding. I am going to ask you questions, you are going to answer those questions, having been sworn by the Notary Public, and the Notary will transcribe your answers, the questions and your answers, and you will be given a copy of the deposition and have an opportunity to correct it, if you wish, and then you will sign it and swear to it before a Notary Public and it will become a permanent part of the court record in this case. Mr. Lyon represents the Talon Company and he has the right to object to any questions that he considers improper. He also has the right to cross examine you. [2]

Does that explain it to you so that you understand exactly what the proceeding is? A. Yes.

Mr. Graham: Have I covered everything, Mr. Lyon?

Mr. Lyon: I think that covers it.

Q. (By Mr. Graham): Mr. Napp, you have been in the slide fastener business for a number of years, haven't you? A. Since 1934.

Q. And how much of that period was spent on the Pacific Coast? A. Since 1934.

Q. Since 1934? A. Yes.

Q. You are one of the pioneer zipper manufacturers in this area? A. The first one.

Q. The first one? A. Yes.

Q. Do you recall attending a meeting at the office of Talon in the month of September, 1949?

Defendant's Exhibit "AL"—(Continued)

(Deposition of Isadore O. Napp.)

A. I know it was in 1949 but I wouldn't recollect the month.

Q. You wouldn't recall the exact date?

A. That is right.

Q. It was in the latter part of 1949?

A. It was in the latter part of 1949. [3]

Q. And do you recall how it came about that you attended that meeting?

A. I was called by Mr. Eisenberg from the Cal Fastener Company and he invited me to the meeting.

Q. And did he say who had arranged the meeting?

A. He said that he had arranged the meeting.

Q. And did he tell you that other zipper manufacturers were being invited?

A. He expected Mr. Lipson there.

Q. Did he say that others were being invited besides Mr. Lipson? A. There were no others.

Q. There were no others in the business at that time? A. Manufacturers here? No.

Q. Well, you did attend that meeting?

A. Yes, I did.

Q. And do you recall the names of those who were present at the meeting and the companies they represented?

A. Mr. Lipson of the Union Slide Fastener, Mr. Eisenberg from the California Fastener, my brother-in-law Mr. Bogash and myself, and the Talon people had Mr. Jager and Mr. Detweiler I believe it was.

Defendant's Exhibit "AL"—(Continued)
(Deposition of Isadore O. Napp.)

Q. And do you recall whether anyone presided at that meeting?

A. There was no formality. We were just [4] sitting around a table talking.

Q. Well, do you recall who opened the meeting? Was any statement made by anybody as to the purpose of the meeting?

A. I believe it was Mr. Eisenberg who started it off by trying to explain the fact that there were rumors around the Talon people were going to bring out the Wilzip on the Pacific Coast and if there was a way of preventing the Wilzip from coming out here.

Q. And did either of the Talon representatives answer that question?

A. No, they were evasive as I would call it. They didn't say yes or no. They were quite evasive.

Q. Well, was there much talk about the Wilzip zipper?

A. There was quite a lot of talk about the Wilzip.

Q. Well, did Talon's representatives say anything about it?

A. No, they didn't. They said it was quite a successful fastener in the East but they didn't think it was necessary to bring it out to the Coast yet.

Q. Did they say whether or not they were interested in bringing it out to the Coast?

A. They thought they might be forced to do it

Defendant's Exhibit "AL"—(Continued)
(Deposition of Isadore O. Napp.)

if competition—if we were not going to stop cutting our throats. [5]

Q. Do you recall who made that statement?

A. It wasn't a direct statement. It was just—I don't even know how to put it. It was almost a direct conversation, you know.

Q. Well, did you have anything to say on that subject?

A. Yes, I did. I tried to convince everybody around the table that cut throat competition is a drastic thing, you hurt yourself more than you do anybody any good, and I tried to point out that the Wilzip was being sold at large in the Eastern territory, and if they bring it out here it wouldn't do neither the Union Fastener nor the Cal Fastener nor ourselves any good; and I also tried to point out to Talon that they would be cutting their own throats, underselling their own product.

Q. Do you recall what you said to the Talon people? A. Just what I'm saying now.

Q. That is about the substance of what you said?

A. Just about that.

Q. Was there a discussion about the price of 7-inch skirt zippers at that meeting?

A. Oh, there were quite a few discussions there. Mr. Eisenberg accused Mr. Lipson of underselling him. Mr. Lipson accused me of underselling him, and there was what you would call a free-for-all conversation.

Defendant's Exhibit "AL"—(Continued)
(Deposition of Isadore O. Napp.)

Q. Do you recall at that time what Talon [6] was selling its 7-inch zipper for?

A. I think it was 7.3 or 7.8, I'm not quite sure.

Q. Did the Talon representatives say anything about the price at which you and the other manfacturers were selling the 7-inch zipper?

A. No, I can't recollect that at all.

Q. Now, you said that you had told the meeting that the Wilzip zipper was being sold in the East. Do you remember whether or not the Talon representatives said anything about the effect of the Wilzip zipper on the smaller manufacturers in the East?

A. No, they didn't say anything like that. There was no statement of that sort at all, that I can remember at all.

Q. Do you remember by whom the meeting was called? I know that you said that you heard from Mr. Eisenberg. Do you recall that anybody in particular had called the meeting?

A. No, I don't.

Q. Was anybody present at the meeting from the Apparel Manufacturers Supply Company, Mr. Abramson? A. No.

Q. Do you recall at that time whether the Conmar Fastener Company was selling its zippers at a very low price in the Pacific Coast market?

A. No, their price was similar to—around the price of Talon, but they did have some closeouts,

Defendant's Exhibit "A1."—(Continued)

(Deposition of Isadore O. Napp.)

or they [7] called it seconds, where they gave a 20 per cent discount.

Q. Was there a discussion at the meeting about premium sales and discount sales of zippers?

A. I think that was brought out at the meeting by either Mr. Lipson or Mr. Eisenberg, maybe myself. I'm not quite sure.

Q. Well, do you recall making any statement to the Talon representatives that Talon in effect was making a premium sale by giving publicity in newspaper advertising to their large customers?

A. Would you mind repeating that?

(Record read as follows:

"Q. Well, do you recall making any statement to the Talon representatives that Talon in effect was making a premium sale by giving publicity in newspaper advertising to their large customers?")

The Witness: There was a discussion about that. I don't know who made that statement, but it was pointed out to the Talon people that advertising for different customers does bring a reduction in price. That was pointed out, but I can't recollect by whom.

Q. Well, do you recall whether the Talon representatives made any complaint about premium sales or discount sales?

A. No, I don't recall that.

Q. Do you recall prior to that meeting what [8] price you were selling 7-inch zippers at?

A. I believe it was around 5.50 a hundred.

Defendant's Exhibit "AL"—(Continued)
(Deposition of Isadore O. Napp.)

Q. 5.50 a hundred? A. Yes.

Q. Now, do you remember what Talon was selling its pin lock zipper at?

A. I think it was 5.90 if I'm not mistaken.

Q. And did you at that time reduce your price, prior to the meeting? A. Oh, sure.

Q. Do you recall how much you reduced it?

A. No, at that time I think we were still 5.50.

Q. Now, the other gentlemen present at the meeting had something to say, too, about the subject under discussion, didn't they?

A. Oh, yes, they did.

Q. Do you recall what Mr. Eisenberg said?

A. It was also a general conversation about the Wilzip situation and what they are going to accomplish by bringing it out here. It wouldn't make a bit of difference what the price was going to be, I mean we would still have to be in the business and we would have to undersell the Talon product because of the advertising they splashed for their customers; and Mr. Eisenberg tried to pin down the Talon outfit, what they intended to do about it, and there was no reply from them; and finally I got angry because it [9] is kind of silly trying to pin a man down to something when you can't really do anything; and after an hour's conversation down there going around a circle, I said, "First of all, you are dealing with an outfit that is a national outfit and the gentlemen sitting over here are just little

Defendant's Exhibit "AL"—(Continued)

(Deposition of Isadore O. Napp.)

screws in a big machine. They can't tell you what the policy is going to be, but as long as you are going to behave yourselves and not try to undersell the Talon people to too large an extent I don't think they are going to bring out the Wilzip."

I said that and they were just sitting there like dumbbells.

Q. Who was that?

A. Mr. Jager and Mr. Detweiler.

Q. Did you make any statement as to what you would do if the Wilzip zipper were introduced on the Pacific Coast market?

A. I did. I said the same thing, "It makes no difference what you are going to sell the Wilzip for, we will have to undersell you on account of the advertising and the name."

Q. Did the Talon representatives or either of them make any statement that they wouldn't bring the Wilzip zipper to the Coast, wouldn't introduce it to the Coast market?

A. No, not that I know of. [10]

Q. Well, did they make a contrary statement, that they would?

A. They didn't say either way.

Q. But they did say it was being considered?

A. They tried to impress upon us that Wilzip is being sold in the East and so far they didn't bring it out here and they don't know what to do about it. I mean, they may if they are forced to do it.

Defendant's Exhibit "AL"—(Continued)
(Deposition of Isadore O. Napp.)

Q. Do you remember at any time prior to the meeting a reduction in the price of Talon pin lock zippers to $5 a hundred?

A. There was none prior to the meeting. I think it was $5.90 at that time or 5— 5.90 I believe. I think that reduction came later.

Q. Do you know what their automatic slider price was? A. A half cent more.

Q. You are not confusing the price of the pin lock with the price of the automatic slider at that time?

A. No. There always was a variation from a cent to a half a cent between the pin lock and automatic lock.

Q. Did Mr. Jager say anything about not being opposed to the sale of the zippers by other manufacturers at 4.50 a hundred?

A. No, I don't believe that Mr. Jager made any statement as to prices, but he did say he was not opposed to [11] the independent fellow being about a half cent under them in view of their advertising.

Q. Do you know what the Wilzip zipper sold for in the East at the time of the meeting, or just prior to that?

A. I heard all kinds of rumors around four cents, 4.2 or something like that—the 7-inch.

Q. That is right.

A. The rumors extended to even 2.75.

Q. That is $2.75 a hundred? A. Yes.

Defendant's Exhibit "AL"—(Continued)

(Deposition of Isadore O. Napp.)

Q. Did you make any statement to the effect that you would sell your 7-inch skirt zippers as low as two cents if a price war occurred?

A. No, I didn't say that. I said it wouldn't make a bit of difference what they sell their fasteners for, I would still undersell them.

Q. You are appearing to testify today pursuant to a subpoena served upon you; is that correct?

A. That is right.

Q. And before coming here have you had any discussion with anybody about giving your testimony today, making a deposition?

A. Yes. Mr. Lipson was in to see me a couple of weeks ago, and I told him I didn't think I could do him any good with my testimony here today, because all I intend to do is tell the truth. [12]

Mr. Graham: I'm going to make a note on the record that I move to have that last part of the answer stricken out. It is unresponsive.

Q. (By Mr. Graham): Did you have any discussion with anybody representing Talon?

A. No, I did not.

Q. You haven't talked with anybody in the Talon organization, or with their attorneys?

A. No, sir.

Q. Your firm, the Roxy Company, is in competition with Union Slide Fastener in the zipper business; isn't that correct? A. That is right.

Mr. Graham: I think that is all I have to ask.

Defendant's Exhibit "AL"—(Continued)
(Deposition of Isadore O. Napp.)

Cross Examination

Q. (By Mr. Lyon): Mr. Napp, a couple of the previous witnesses have referred to what they term a wisecrack that you made at this meeting to the effect that if you found it necessary you would put a gold nugget in each box of zippers.

A. That is true.

Q. And you recall making such a remark?

A. That is right.

Mr. Lyon: That is all.

Mr. Graham: That is all. The same stipulation, that the deposition may be signed before any Notary Public. [13]

Mr. Lyon: So stipulated. [14]

/s/ ISADORE O. NAPP

Subscribed and sworn to before me this 8th day of December, 1952.

[Seal] /s/ FLORENCE J. FARNSWORTH,

Notary Public in and for the County of Los Angeles, State of California. My Commission expires March 22, 1955.

[Endorsed]: Filed Dec. 10, 1952.

DEFENDANT'S EXHIBIT "AM"

[Title of District Court and Cause.]

DEPOSITION OF JOHN T. HAVEKOST

Appearances: William C. McCoy, Esq. Evans & McCoy, Esqs. Bulkley Building, Cleveland 15, Ohio, and Ralph E. Meech, Esq. Meadville, Pennsylvania, Attorneys for Plaintiff. William J. Graham, Esq. 12 East 41st Street, New York, New York, Attorney for Defendant.

Deposition of John T. Havekost, a witness of lawful age taken on behalf of the defendant in the above entitled cause, wherein Talon, Inc. is the plaintiff and Union Slide Fastener, Inc. is the defendant, pending in the District Court of the United States, Southern District of California, Central Division, pursuant to the notice hereto annexed, before Solomon H. Halpern, a notary public in and for the County of New York, State of New York, at 12 East 41st Street, New York, New York, on the 27th day of November, 1954. [1]*

Mr. Graham: Deposition taken pursuant to notice served upon the plaintiff's attorneys on October 29, 1954, providing for the taking of the deposition on November 13, 1954. Since, the taking of the deposition has been adjourned by mutual consent of the attorneys for both parties to November 27, 1954, at 10 o'clock a.m., at the place designated in the notice.

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* Page numbers appearing at top of page of Original Deposition of Record.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

It should be noted on the record that the deposition of the witness, John T. Havecost, was previously taken in this proceeding, but that the stenographer who took said deposition never did produce a transcript thereof, rendering it necessary to retake the deposition.

JOHN T. HAVEKOST

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

Q. (By Mr. Graham): Will you please state your name and address?

A. John T. Havekost, 33-30 149th Place, Flushing, Long Island.

Q. Mr. Havekost, what is your present occupation?

A. I am what is termed a checker of mechanical engineering drawings. [2]

Q. For what firm?

A. Reeves Instrument Company.

Q. That is your title, checker of——

A. Checker of engineering drawings.

Q. How long have you been employed in that capacity? A. Two years.

Q. What was your occupation previous to that?

A. Previous to that I was a designer of auto-

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

matic and high speed machinery, mainly zipper machinery.

Q. Was that for the Reeves Instrument Company? A. No.

Q. Will you state what company that was for?

A. Well, there were several companies. To begin with, it was for the Zenith Development Company, U. S. Rubber Company, and Slide Lock Company.

Q. Do you recall when you first went with the Zenith Company?

A. Well, I think sometime in '39. Oh, I should judge, let me see, if I can recall correctly, it must have been about November or October of 1939.

Q. For how long were you employed by the Zenith Company?

A. Oh, I would say until 1941, I believe, if my memory doesn't fail me.

Q. Was the correct name of that company the Zenith Manufacturing Company?

A. Zenith Development Company. [3]

Q. While you were employed by that company, can you state who the principal stockholder of that company was?

A. Well, I don't know who the principal stockholder was, but the man that was in charge over me, that I know, was Mr. David Silberman.

Q. Were you employed by Mr. Silberman when you took your job with that company?

A. Yes, I was hired by Mr. Silberman, if you want to call it such.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Q. Will you state the circumstances under which you met Mr. Silberman and secured employment with the Zenith Development Company?

A. Well, he came—I used to have an engineering office at 154 Nassau Street, under the name of the Havekost Engineering Company, and through a mutual friend, he was brought to me for me to do some work for him, which I did, and later on it developed into him asking me to close my office and come with him.

Q. What was the nature of the work that you did for him before you were employed by Zenith?

A. Designing parts of machinery for zippers.

Q. When you left the Zenith Manufacturing Company, what company did you go with?

A. I went with Slide Lock.

Q. Who was in charge of the work of the Slide Lock Company?

A. A party by the name of Max Lange. [4]

Q. How long were you with the Slide Lock Company?

A. I was with them, I think, to the end of '43, I'm not sure. I don't recall the actual date. Maybe '44. I was with them approximately two years, I think.

Q. I show you a document which is a copy of what appears to be an assignment, bearing the signature of Max H. Lange, and call to your attention that the date on that document is December 8, 1948, and ask you if that refreshes your recollection as

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

to the period you served with the Slide Lock Corporation? A. I recall signing this.

Q. Do you recall having signed the original of this document? A. Yes.

Q. To whom did you deliver the original of this document?

A. I think that the original document was delivered to a Mr. Davis, if I am not mistaken.

Q. Was he an officer of Slide Lock?

A. That I don't know. See, I was no longer connected with Slide Lock when that was signed. I had left slide lock, I think it was '44, the early part or the latter part of '44, I'm not sure.

Q. Do you recall, Mr. Havekost, having produced this document at the taking of your deposition in December of 1952, in the Sanford Hotel in Flushing, New York?

A. I was never in the Sanford Hotel. [5]

Mr. Burkitt: January 3, 1953.

The Witness: I don't recall being in the Sanford Hotel.

Q. You don't recall having given a deposition before in this proceeding?

A. I think I gave a deposition out in Jamaica.

Q. If you recall, we met in Jamaica, and in order to have more adequate quarters to take the deposition, we drove over to the Sanford Hotel?

A. That's right.

Q. Do you recall having produced this document at that time?

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

A. Well, you have it. I must have produced it.

Q. It bears a notation "Defendant's Exhibit 2 For Identification," with the signature of Helen Jean Paul, and I offer it for identification as Defendant's Exhibit 1 for identification on the taking of this deposition.

(Document dated December 8, 1948, marked Defendant's Exhibit 1 for identification.)

Q. I show you another document, Mr. Havekost, which appears to be a copy of an affidavit made by you, which bears some pen and ink notations in the margin and in the body of the document, and ask you if you recognize that document?

A. That refreshes my mind; yes, sir.

Q. Do you recall having executed the original of that document? [6] A. Yes.

Q. Is the handwriting on this copy your handwriting? A. That's my handwriting.

Mr. McCoy: All objected to as leading.

Q. There is some handwriting on the document. Will you state whether or not that is your handwriting? A. It is.

Q. Do you recall to whom you delivered the original of this document?

A. That I believe was delivered at the same time this other document was that you have. It was in Mr. Lange's office, there, to Mr. Davis. I believe it was at the same time, if I recall correctly.

Mr. Graham: I offer this document as Defendant's Exhibit 2 for identification.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Mr. McCoy: It is not offered, is it?

Mr. Graham: For identification.

Mr. McCoy: Are you offering the document, or are you merely marking it for identification?

Mr. Graham: I'm offering it for identification.

Mr. McCoy: Objection. May I see the document. Objected to as self-serving statement so far as the matter appearing on the face of the document is concerned. No foundation has been laid for the material set forth in this document. It is further objected to because the witness is present, and this written paper, Defendant's Exhibit 2, is [7] not in support of any oral testimony given by the witness, and is setting forth material that is very leading in character, and the witness has established no independent recollection of the statements of the document in this proceeding. And the data stated in the document, and the date of the document is after the issuance of the patent in suit, 2,437,793.

(Affidavit marked Defendant's Exhibit 2 for identification.)

Q. After you left the employment of the Slide Lock Company, what position did you take, with what company?

A. I went with the U. S. Time.

Q. U. S. Time corporation? A. Yes.

Q. What was the nature of your duties there?

A. Designing automatic machinery.

Q. Would that machinery have anything to do with the manufacturing of zippers? A. No.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Q. After you left the U. S. Time Corporation, did you work for any other company before you went with the Reeves Instrument Company?

A. Yes, I worked for what they term a jobbing engineering concern. I worked for them three months. Let's see if I can recall the name. I think it's the Allied Drafting Service, [8] I'm not sure. After that I worked for U. S. Rubber.

Q. What was the nature of your duties at the U. S. Rubber Company?

A. Designer of a high speed automatic zipper machine.

Q. How long were you with the U. S. Rubber Company?

A. I was with them approximately a year and a half.

Q. Then you went with the Reeves Instrument Company? A. No, then I went west.

Q. Did you take a vacation

A. I took a vacation, that's right.

Q. After you had had your vacation, you went with the Reeves Instrument Company? A. No.

Q. Will state where you went?

A. I went with the Devenco Company. They are an engineering firm that does special design work for companies that want work done.

Q. Do you hold a degree in engineering?

A. No.

Q. What line would you say your entire business experience has been in?

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

A. The mechanical field.

Q. When you were employed by the Zenith Development Company, did you have a contract with that company? A. I did. [9]

Q. Was the contract in writing?

A. It was.

Q. Do you have any evidence of that contract at the present time?

A. I don't know. I may have it at home, I'm not sure. After all this stuff, and the years that have passed, I might have destroyed it as not being essential any longer.

Q. If you do find a copy of such contract, will you produce it as part of your testimony?

Mr. McCoy: Objected to, unless the witness will be reproduced to make it a part of his testimony.

Mr. Graham: Can we agree, then, that if he should find such contract, we'll adjourn the taking of his testimony?

Mr. McCoy: We would like to see what he produces.

Mr. Graham: We'll resume the taking of his testimony at that time?

Mr. McCoy: Let's see what he produces to see whether we can let that document in. But it can't be a part of the testimony unless it be produced during the taking of testimony. Is the witness now testifying under subpoena duces tecum?

Mr. Graham: No, he is not.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Mr. McCoy: He was at the prior hearing, was he not?

Mr. Graham: That's right. [10]

Mr. McCoy: And the witness was then unable to produce such a document, isn't that true?

Mr. Graham: That is correct. No such document was produced at the taking of the first deposition.

Q. Do you recall the terms of your contract with Zenith Development Company?

A. No, I can't recall the exact terms. It's been so long ago that I can't recall them. All I know is that I had a contract that protected me whatever I developed.

Q. Were you hired for any specific purpose?

A. Specific purpose in what way, the design of special machinery or zipper machinery?

Q. Yes.

A. Yes, I was hired for that purpose.

Q. What was the particular type of machine that you were hired to design?

A. I was hired to design a machine that would cut from the strip, rather, a strip of material, that is, metal, which had formed on it what you might call certain tits that formed the head of a zipper unit. It was fed into a machine to be cut off and attached to the tape. That was the purpose of the machine.

Q. When you entered the employment of the

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Zenith Company, were any similar machines exhibited to you? A. No.

Q. Had you been familiar with zipper manufacturing [11] machinery prior to your employment?

A. Well, I had a working knowledge of it back in 1938. But beyond that, why, I can't say that I did anything with it.

Q. Were you familiar in general with zipper manufacturing machines?

A. I was familiar with, oh, two types, you might say.

Q. What were those types?

A. Well, one was the pre-worked metal strip, and the other was the punching die job which stamped out the units, which were hopper fed.

Q. Were you told at any time by Mr. Silberman that he wanted to develop a machine that would not be an infringement of the Conmar machine?

A. Well, he asked me could I probably produce something, and I told him I could.

Q. What did you do along the lines of producing such a machine?

A. Well, I developed a machine using a principle of the automobile engine.

Q. Can you state what that principle was?

A. Well, that principle was connecting your rods which were hooked onto your punchers with a crankshaft for raising and lowering and cutting off the element, and it produced two slides operated

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

from the same movement, which clamped the unit to the tape. [12]

Q. Was that what you would call a punch block construction? A. You could call it that.

Q. Did Mr. Silberman discuss the work you were doing and point out any problems that he wanted to have solved?

A. Well, Mr. Silberman didn't have too much instruction what to do with it. He left me on my own.

Q. Did Mr. Silberman indicate to you in any way that he had been working on the problem of developing a new machine?

A. Not that I know of.

Q. Did you familiarize yourself in any way with zipper machines that were already in existence, either by studying the machines themselves or drawings of the machines?

A. Well, I mainly studied from drawings or pictures of machines. I didn't see any machine whatsoever.

Q. Did you, as the result of your work for Zenith Development Company, develop any machine such as you were hired to do?

A. Yes, I did.

Q. Do you recall when you completed that development ?

A. I think it was when the machines were built or while I was doing the engineering.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Q. When did you complete your engineering work?

A. The engineering work was completed in the early part of 1939, six months after I had taken the job with Mr. Silberman.

Q. I refer you again to Defendant's Exhibit 2 for identification, [13] which refers to your employment by Zenith Manufacturing Company from December 1939 to February 1953, and ask you if that refreshes your recollection as to the date on which you completed your engineering work?

A. Yes. The engineering work was completed in 1940, around the end of August, the early part of October—September.

Q. Do you know whether or not a machine was built? A. Yes, the machine was built.

Q. In accordance with your engineering work?

A. Right.

Q. Did you prepare drawings?

Mr. McCoy: All objected to as leading. Let the witness tell what he did.

Q. Did you prepare any drawings?

A. Yes.

Q. What did you do with those drawings?

A. They were sent to a firm to built the parts.

Q. Do you recall the name of that firm?

A. It's in Miami. I think it's the Southern Engineering Company in Miami, Florida.

Q. Did you send your drawings to that company

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

on your own responsibility, or were you directed to do so by anyone?

A. I was directed to do so by Mr. Silberman.

Q. Do you know whether or not the parts were made? A. They were. [14]

Q. Do you know what happened to the parts?

A. Yes. They were shipped to the Hared Manufacturing Company of Philadelphia, who, in turn, assembled the machines.

Q. Did you at any time visit either of those companies? A. Yes.

Q. Did you have any discussion with any of their representatives with respect to the machine or the parts of the machine?

A. In reference to the parts of the machine, yes.

Q. Did you have any part in the erection of the machine?

A. Only to issue instructions how to go about it.

Q. Did you see the machine when it was constructed? A. I did.

Q. Did you see it in operation? A. I did.

Q. During this period while you were doing engineering work on a zipper manufacturing machine, did you at any time consult with a patent attorney?

A. In regards to what, to patenting the machine?

Q. In regard to patenting the work you were doing?

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

A. No, that was simply up to Mr. Silberman. I spoke to him about it.

Q. You did discuss it with Mr. Silberman?

A. Yes.

Q. Did he ask you for any written information concerning your work? [15]

A. No, he had the drawings, and I explained to him what I thought had patentable matter in it.

Q. Did he ask you questions about it?

A. He might have during the course of conversation.

Q. You yourself did not visit any patent attorney or discuss the matter with any patent attorney?

A. No.

Q. Did you discuss the patenting of the machine with Mr. Silberman? A. I did.

Q. What did he say with regard to that?

A. Well, he just let it hang fire. He didn't give me any definite answer about it at all.

Q. While you were with the Zenith Company doing this work, did you receive a salary?

A. I did.

Q. Did you receive any additional compensation? A. I did.

Q. What was the nature of that compensation?

A. Well, I don't know what you can call it, whether it was a bonus or an actual outright receipt for some royalties or something for the machines. That I don't know.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Q. Do you recall when you began to receive additional compensation?

A. It was more or less around the Holidays.

Q. Of what year?

A. It must have been around the end of 1940, I think.

Q. Was that after you had completed your engineering work on the machine that you designed?

A. And after they were running, yes.

Q. After the machines were operating?

A. Yes.

Q. Was that additional compensation paid in one lump sum or was it periodic compensation?

A. It was paid in one lump sum.

Q. Do you recall how much that was?

A. I'm not sure. No, I don't recall.

Q. Do you recall when you received it?

A. I think it was around the Holidays.

Q. Of what year? A. Of 1940.

Q. You stated before, Mr. Havekost, that you were employed for the purpose of building, of designing a high speed zipper manufacturing machine, and you said something about applying an automotive principle to the construction of the machine. Did the machine that you designed have that construction? A. It did.

Q. Can you state in general terms what the principle of the machine was?

A. Well, it had a closed crankcase in which there was a [17] drive shaft in it, and hooked onto

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

the drive shaft was connecting rods which operated a plunger like a piston. The connecting rods were readily detached from the piston. And that's the principle I used.

Q. After the machine was constructed and you saw it operate, did it perform the function for which you had designed it? A. It did.

Q. Do you recall the direction in which the power delivery of the machine that you designed was given when the machine was in operation? Was the power delivery vertical or was it horizontal?

A. Vertical.

Q. Do you recall how many reciprocating parts that machine had?

A. Well, I should say all told, the main reciprocating parts amounted to approximately twenty, twenty-five.

Q. Do you recall what some of them were?

A. Well, the ratchet feed was one. The clamping of the units was another. The movement of the ram or punch was another. And the feeding of the material was another.

Q. Where was the source of power for moving all these reciprocating parts?

A. There was a motor strapped, rather mounted under the machine proper. [18]

Q. Were the parts connected in any way, the reciprocating parts?

A. Yes, they had to be connected as a unit.

Q. And to what were they connected?

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

A. To the drive shaft.

Q. Did the drive shaft operate all of the reciprocating parts? A. It did.

Q. Did the machine that you designed have any effect upon vibration? A. In what way?

Q. Was the vibration considerable, or was it just a limited vibration?

A. The usual vibration of a machine of that type.

Q. Do you recall whether the punching operations of that machine were all operated by one part, or whether there were several parts?

Mr. McCoy: Objection. There has been no testimony as to any punching operation of this machine.

Q. Did this machine that you designed involve a punching operation? A. It did.

Mr. McCoy: Same objection.

Q. How were those punching operations actuated?

A. Through the crankshaft and connecting rods.

Q. When did you sever your connection with the Zenith Development Company?

A. Well, approximately, I think it was in '42 sometime. It might have been '43, I'm not definitely sure. It was after the war when we couldn't get any more material.

Q. After the war started?

A. After the war started. I think we went into it in '41, and it came to about '42 until it caught up to us, and it was in '42, '43, sometime in there.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Q. What kind of work were you doing after you had designed this machine that we have been talking about? A. With Silberman?

Q. That's right.

A. Well, I was supervising the construction, and also watching the material and taking care of little odds and ends that might pop up.

Q. You were supervising the construction of the machines? A. Correct.

Q. According to the design that you had developed? A. Correct.

Q. Do you know how many such machines were constructed?

A. Oh, approximately, I think there were six.

Q. Were those machines sold, or were they used by the Zenith Development Company?

A. That I don't know. After the Zenith Development [20] Company had them built, and all that, I don't know what arrangement was made with the companies that used them.

Q. I show you, Mr. Havekost, a copy of United States Letters Patent, No. 2,437,793, issued to D. Silberman, and ask you if you are familiar with that?

Mr. McCoy: Objection. This is the patent in suit. The witness is an engineer and capable of making his own drawings. My recollection of the former proceedings is that the patent itself was shown to the witness and he was asked leading questions about the type and kind of machinery that he de-

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

veloped as compared with the drawings and there is no foundation laid as to any machine of that character thus far in this examination. It's an extremely leading form of testimony. All the documents produced are subsequent to the issuance of that patent, and no drawing is produced made by the witness, no specific machines identified. The witness is not qualified as a patent expert.

Q. Are you familiar with that patent, Mr. Havekost?

A. I have read it over and went through it. If you call that familiar, yes, to that extent.

Mr. Graham: I'll offer that for identification.

(U. S. Letters Patent No. 2,437,793, marked Defendant's Exhibit 3 for identification.)

Q. Mr. Havekost, do you have in your possession any [21] drawings that you made of the machine you designed for the Zenith Company?

A. I may have, I'm not sure. I have been cleaning up after ten or fifteen years after working on those things, cleaning up my records. I might have cleaned it out. I wouldn't say definitely I have it. I can look and see if I can locate them.

Q. Did you at any time make a claim that you had invented the machine described and claimed in the Silberman Patent, No. 2,437,793?

Mr. McCoy: Objection as leading and irrelevant, immaterial, no foundation laid.

The Witness: Do you want me to answer?

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Q. You may answer the question. He has noted his objection.

A. I made a claim as to some of the things in the patent, yes, as riding on my original design.

Q. Do you recall what parts of the patented machine you claimed you had invented?

A. Well, I think the mechanism of the connecting rods operating the punch or ram, the feasibility of disconnecting them very readily for repair work. I think the crankcase, self-contained oil, and all that, the drive shaft. That's all I recall just now.

Q. In Defendant's Exhibit 2 for identification, there is a statement reading as follows—— [22]

Mr. McCoy: Objection. It's an attempt to disqualify your own witness by reading from a self-serving statement heretofore marked for identification only, and a statement made after the Silberman patent had issued, and long after the prior work done by the witness had been completed.

Mr. Graham: I'm not offering the testimony for the purpose of discrediting the witness. I'm not asking the question for the purpose of discrediting the witness.

Mr. McCoy: The witness has told his recollection of what he contributed. What counsel is reading is something different.

Mr. Graham: I think it should be stated on the record at this point that Mr. Henry L. Burkitt, attorney, is taking part in this proceeding to the

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

extent that he is conferring with plaintiff's counsel in connection with objections to questions propounded by defendant's counsel.

The objections have been noted, and I'll proceed with the questioning.

Q. Mr. Havekost, in Defendant's Exhibit 2 for identification, a statement is made: "I had had special training and years of experience in automotive work and had developed the idea for a zipper chain machine which worked on the principal of an automotive engine incorporating a crankcase, crankshaft and automotive type connecting rods arranged to support and operate the ram." [23]

Was that statement true, Mr. Havekost?

A. Correct.

Q. At the time you made it? A. It was.

Q. In the same document, Defendant's Exhibit 2 for identification, the statement is made: "I never at any time signed over any patent rights or any exclusive rights to use that type machine either to Silberman or firms he was connected with, or to any other person or company, and that I have always maintained the right to use the machines as well as Silberman."

Is that a true statement, Mr. Havekost?

A. That's a true statement, to the best of my knowledge.

Q. In the same document, Defendant's Exhibit 2 for identification, the statement is made: "I was told by Silberman that it was his desire that no

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

patent be applied for on this machine. It is only within the past two months that I have learned that Silberman applied for the patent #2-437-793 which is also my first knowledge that Silberman ever claimed to have invented the machine. I was greatly surprised to learn that he claimed to be the inventor of this machine which he, in 1941 and 1942 acknowledged to have been invented by me and for the use of which he paid me royalties then and later."

Q. Was that a true statement, Mr. Havekost, when you made it?

A. Yes, when I made it, it was a true statement.

Q. Did Mr. Silberman acknowledge to you that you were the inventor of the machine that you have described in your testimony, in 1941 and 1942?

A. Well, verbally I don't think you could call it such, but in as much as he didn't ask for a release from me after my telling him it had patentable matter, I assumed that it was acknowledged that I was the inventor of it.

Q. In the same document, Defendant's Exhibit 2 for identification, the statement is made: "A construction incorporating the idea of closing jaws being operated directly by the ram, was invented and developed by me during 1943."

Mr. McCoy: Where is that taken from?

Mr. Graham: Defendant's Exhibit 2 for identification.

Mr. McCoy: What part?

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Mr. Graham: Here (indicating).

Q. Was that a true statement when you made it, Mr. Havekost? A. Yes, sir.

Q. Is it still a true statement, Mr. Havekost?

A. It's still a true statement.

Q. To whom did you make this claim?

A. Well, that was made, I believe, when I made that statement to Mr. Lange.

Q. That's Mr. Lange of Slide Lock Corporation? A. Yes. [25]

Q. I show you Defendant's Exhibit 1 for identification, and ask you if at the same time or approximately the same time that you made that claim, you executed an assignment of your rights in the Silberman patent to Mr. Lange?

A. Well, I read this before. Yes, that's true.

Q. After you left the employment of the Zenith Development Company, did you have any further contact with Mr. Silberman?

A. In regards to what?

Q. With regard to your claim that you had invented part of the machine which he had patented?

A. Not until this question with Mr. Lange came up did I have any further——

Q. Did you after this question with Mr. Lange came up have any contact with Mr. Silberman?

A. Yes.

Q. Did he contact you or did you contact him?

A. He contacted me through Mr. Lange. I don't recall him contacting me directly.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Q. Did you have any discussion with Mr. Silberman or any meeting with him regarding this matter? A. No.

Q. Did you have any meeting with any representative of Mr. Silberman? A. No, I didn't.

Q. Did you sign any document after these documents? [26] A. I did.

Q. Do you recall when that was?

A. A document was signed in '48. Oh, it might have been six months after, or something, that I——

Q. Would it have been sometime in 1949?

A. It may have been.

Q. Do you recall what that document was?

A. Yes, it was a signing of a release of my claim against this patent.

Q. How did it happen that you signed that release? Did you talk to anybody before you signed it? Did you meet with anybody before you signed it? A. No.

Q. Was the document sent to your home, or did you go someplace to sign it?

A. I went to the office of a lawyer—what was his name again? It was a lawyer retained by Mr. Silberman, I think. Oh, I'll tell you the man. It was the lawyer that defended that communist girl when that case came up.

Q. Archibald Palmer? A. Palmer, yes.

Q. How did you happen to go to his office? Were you requested to go there?

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

A. I was requested to go.

Q. By whom? [27]

A. I don't recall those things. I don't recall who it was.

Q. You went to his office as a result of a request made to you? A. Yes.

Q. Had you seen the document that you signed before the day you visited Mr. Palmer's office?

A. No.

Q. Did you read the document?

A. I read it, as far as I can recall, sure.

Q. Was any consideration paid to you for signing that document? A. There was.

Q. You stated that prior to signing that document, you had had no contact with Mr. Silberman?

A. Not that I can recall.

Q. After you left the Zenith Company——

A. Yes.

Q. Had you had any contact with Mr. Silberman since that time? A. No.

Q. Have you discussed this matter with anybody prior to this examination and also on the deposition taken in Flushing on January 3, 1953?

A. I haven't discussed it with anybody except informed the Missus that I was going to these cases.

Q. When you signed the document in Mr. Palmer's office, did you have any discussion with him about it?

A. In regards to what?

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

Q. About signing the document or the reason for signing the document?

A. Well, the reason was plainly stated, to go to work and not make any claims against this patent on the basis of my original design.

Q. Did you discuss this matter of the release before you signed it with your own attorney?

A. I didn't have any attorneys.

Q. Did you discuss it with Max Lange?

A. I may have. I wouldn't say definitely.

Q. You don't recall what the discussion was?

A. I don't recall, no.

Q. Do you recall by whom you were employed at the time you signed the release?

A. I was employed—let me see—by the Devenco Company.

Q. You had left the employment of Mr. Lange?

A. I wasn't employed by Mr. Lange since '45.

Mr. Graham: I'd like it to be stated on the record that I reserve the right to examine Mr. Havekost further at a future time to be specified and upon due notice to the attorneys for the plaintiff.

That's all I have. [29]

Cross Examination

Q. (By Mr. McCoy): Mr. Havekost, in the machine that was designed by you while at Zenith Development Company, that machine was intended to use wire that had the completely formed zipper elements in it, so that the wire could be fed into

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

the machine and merely have these elements cut off and attached to the tape, isn't that correct?

A. Well, I don't think you could call it a completely formed element, but it was a formed element, that is, not complete. The completion was made when it was cut from the unit, from the strip of wire, let's put it that way. In other words, the retaining part of the element was formed in the wire.

Q. Did it have recesses formed in the edges of the wire? A. No.

Q. Where the elements were cut off?

A. No.

Q. But the function of the machine was to cut off what we call scoops in the zipper industry, the individual elements? A. Right.

Q. And merely attach those to the tape, isn't that true? A. Correct.

Q. That was the same general operation that was carried on by the Conmar machine at that time, was it not? A. It was.

Q. And the only thing done by the ram of the machine was the cut off tool, was it not? [30]

A. Correct.

Q. When there was the necessity to resharpen or replace a punch, you removed the ram from the connecting rods to sharpen or replace a punch, did you?

A. Well, you removed a ram, what you might

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

call a ram from the head which was fastened—the head was fastened to the connecting rods and the ram was attached to the head.

Q. Now, the closing jaws, the jaws for clamping the legs of the scoop or zipper element to the tape, those jaws were operated from the crankshaft, were they? A. They were.

Q. Will you tell us more of the nature of the years of experience in automotive work preceding your connection with the Zenith Development Company, the nature of the work that you did during that period?

A. Well, I started out in the automobile business in 1904 for the Locomobile people in their shops. Then I went to the Lozier people and worked in the shops and in the test sheds with that crowd.

From Lozier, I went with the old Smith & Mabley, in New York City, as assistant to the shop superintendent. Then, during that early period of the automobile game, why there were bankruptcies ever so often, they couldn't seem to get the money, and Smith & Mabley failed.

Then I drove an automobile privately as a chauffeur for a [31] while. Meanwhile, I was studying at Cooper Union for an engineering degree, and I left the driving and went to work for the International Motors. At International Motors, I was on the Board, helping to design the bulldozer truck, and when they moved to Plainfield, I was put in

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

charge of heat treating of steel and testing of the steels. In other words, I was head inspector.

After they went into bankruptcy, I went to the Jones Speedometer Company on tooling for making their speedometer. After that, I went to the Norma Ballbearing Company as tool designer on their tooling. From there I took a chief draftsman job with the Duplex Engine Governor Company, who made governing devices for trucks, and so forth. After that concern, I went with the Klein-Schmidt Electric Company as their design engineer and production man. From there I left and opened up my own office in 1920, 1919, and I was in that office—I had my own business for twenty years, until after the crash, I closed up the office in 1938. From thereon, I have been knocking around, if you want to call it such.

Q. At the time you gave your prior testimony in these proceedings in New York, heretofore referred to, you were testifying in response to a subpoena, were you not? A. Yes.

Q. Have you a copy of that subpoena?

A. Have I? [32]

Q. Yes. A. No.

Mr. McCoy: Has counsel a copy of the subpoena?

(Document produced by counsel.)

Q. In this subpoena dated December 9, 1952, you were requested to bring with you all correspondence, affidavits, assignments, records and other

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

data in any way relating to dealings between you and David Silberman and Talon, Inc., or its representatives, or the attorneys for either David Silberman or Talon, Inc. with respect to machines and methods for manufacturing slide fasteners.

Did you make an earnest search to produce the character of documentary evidence referred to in this subpoena?

A. I did. I think I did bring them along with me. I'm not sure. But I looked high and low for them, and I even looked this second time when Mr. Graham called me to see what I could find. Somehow or other, I either misplaced them or threw them out, I don't know.

Q. But you did have with you all the documents of every character that you could find?

A. Right; at that time I believe I did.

Q. In your testimony, you referred to other drawings that you might locate. Have you tried prior to this examination to locate such drawings as you could pertaining to this machine we are talking about? [33]

A. Yes. I still am looking for it. We are in a little bit of chaos at home. I had a son move in with me with a lot of furniture, and all that, and it's pretty hard to find anything at the present time.

Q. Have you heretofore shown any such drawings to Mr. Graham or to others connected with the litigation?

A. I have showed drawings similar to what I am

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

speaking of to Mr. Lange at the time when this question came up of writing these agreements.

Q. That was prior to the present——

A. Yes, that was prior.

Q. Your dealings with Mr. Lange had to do primarily with foreign patents, did they not?

A. It did, right.

Q. It had nothing to do with the United States patent, isn't that correct?

A. That's as far as I understand it; that's what it was supposed to be.

Q. Your attention has been called to material written along the side of the document marked Defendant's Exhibit 2, and reading: "A construction incorporating the idea of closing jaws being operated directly by the ram, was invented and developed by me during 1943."

What was the nature of the matter there referred to?

A. Well, I believe at that time I had read the patent of [34] Mr. Silberman, and I wanted it to be shown that the patent didn't differ in no way as far as I could see from what I did with my machine.

Q. You mean that your machine was identically the same as the Silberman patent?

A. That's what I was having inference to, yes.

Q. During your other testimony, you identified many drawings in connection with the patent with which you had no corresponding parts in your own

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

machine, did you not? A. I might have, yes.

Q. So there are many differences between your machine and the Silberman machine?

A. I would say so.

Q. And the only similarities that you have talked about are in the application of the so-called internal combustion engine piston and crank arrangement in your machine that you also noticed in the Silberman machine, isn't that correct?

A. Right.

Q. Now, in 1943, where were you working?

A. In 1943, I believe I was working for Slide Lock Corporation.

Q. But you had long since left the employment of Mr. Silberman, hadn't you?

A. Yes, sir. Well, I could say I left the employment of Mr. Silberman for about a year previous to that. [35]

Q. Have you made any effort to locate anyone of these six Zenith machines that were made?

A. Oh, I know where they are. At least up to two years ago, anyway.

Q. You knew where they were when the testimony was given previously by you in this proceeding? A. Yes, sir.

Q. Those machines used the principles of the Conmar process of first rolling the strip wire to form the projections and pockets in the element prior to the entry of the metal into the machine?

A. Only five of them did it that way. The other,

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

the sixth one, the metal was fed directly into the machine.

Q. But that has been a modification of the machine since you—— A. No, I designed it.

Q. You designed that? A. Yes.

Q. But it was previously formed metal that was fed into the machine, the sixth machine?

A. Correct.

Q. So that the only function of any of these six machines was to cut off, to shear off the zipper element and attach it to the tape? A. Yes.

Q. In the industry, that was pretty much known as the [36] Conmar type machine, was it not?

A. Correct.

Q. Do you know of any threatened litigation or litigation between Mr. Silberman and Slide Lock during your connection with Slide Lock Corporation? That was Mr. Max Lange's company?

A. Max Lange's company previously. Yes, well, when I worked with them, Mr. Lange had nothing to do with this type of machine. Mr. Lange wanted me to design a machine for him, and in as much as the design, they wanted it similar to Mr. Silberman's, I refused to do it for them, in fact, figuring that Mr. Silberman and I had the first call on those machines. But I did design a machine for him which he didn't build.

Q. Did you ever file applications for letters patent of your own, either in the United States or in foreign countries?

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

A. No, sir, because I figured that anybody that hired me, it was their prerogative to do it.

Q. After you left the Zenith Development Corporation, did you communicate to Silberman any new ideas that you might have on zipper-making machines? A. No, sir.

Q. (By Mr. Meech): Mr. Havekost, what were the events leading up to the signing of this Defendant's Exhibit 2?

A. That's that contract with Lange; is that Exhibit 2?

Q. That's right. [37]

A. Well, previous to when I signed this, Mr. Lange got in touch with me and asked me to visit him at his place of business. I went there, and he was the one who called my attention to the patent issued to Mr. Silberman. And he propositioned me to the effect that when I first went with him, I told him of my design with Silberman and I wouldn't go to work and give him a similar design. And then he showed me this patent, and I said a lot of that stuff is similar to what I originally designed for Silberman. Then I pointed it out to him according to this affidavit.

Q. Wasn't it true that he was building machines at that time for David Silberman?

A. That I don't know. I couldn't swear to it.

Q. You have no recollection of any controversy between Lange and Silberman?

Defendant's Exhibit "AM"—(Continued)
(Deposition of John T. Havekost.)

A. No, I have no—at least I didn't hear of anything at that time.

Mr. McCoy: That's all.

Redirect Examination

Q. (By Mr. Graham): Mr. Havekost, you answered one of Mr. McCoy's questions, and said at the time you last testified in this proceeding, you knew where the Zenith machines built from the drawings made by you were located. Will you state where those machines were located at that time?

A. Five of them were located at the Hared Fastener Company [38] in Philadelphia, and the other one was located at the Mayer Import Company at Montreal.

Q. Did you know for a fact that those machines were still there at the time you last testified?

A. Well, I knew definitely that they were at the Hared Fastener Company; that is, they were having machines still producing. I wasn't at the plant. But as far as the Mayer Import Company is concerned, I understand that Mr. Lasner, the owner of that company, had died, and there I wouldn't say that they were in operation.

Q. You then didn't know that these five original machines were at the Hared Fastener Company. You just believed they were?

A. Well, let me see. Two years ago I was down to Philadelphia, and I met Mr. Hared, and I asked him how the machines were coming along.

Mr. McCoy: Objected to as hearsay.

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

A. And he said that his boy is in charge of the place now, his two sons, and that the machines were operating all right.

Q. You didn't see the machines? A. No.

Q. You didn't visit the plant?

A. I didn't visit the plant.

Q. And you haven't visited the plant of the Mayer Import Company? A. No. [39]

Q. You also testified that one of the machines constructed from your drawings worked upon preformed metal strips, metal strips in which zipper elements had been preformed, and that that machine cut off the preformed strip and attached it to the tape, is that correct?

A. Well, they all do that, all the machines do that from preformed metal. But as Mr. McCoy said, the Conmar type, they preform the metal and wind it up on rolls, and then unwind it into the machine. That's the Hared Fastener stuff. While the one in Montreal, the metal is preformed and fed directly into the machine.

Q. The one at the Hared Fastener Company did the work on preformed metal or on metal that didn't—— A. On preformed metal.

Q. When the preformed metal was severed from the strip and attached to the tape, at the time that was done, was there any operation which also completed the formation of the element?

A. Well, if you call the forming of the legs when it was cut off, that's an operation. That's what com-

Defendant's Exhibit "AM"—(Continued)

(Deposition of John T. Havekost.)

pletes it. Otherwise, it can't be attached to the tape.

Q. So that there was some operation formed upon the preformed element in order to complete the formation of it? A. Correct.

Mr. Graham: That's all.

(It was stipulated and agreed by counsel for the respective parties that the signing of the foregoing deposition be waived.) [40]

[Endorsed]: Filed January 17, 1955.

DEFENDANT'S EXHIBIT "AN"

[Title of District Court and Cause.]

DEPOSITION OF WILLIAM WRAY

12 East 41st Street, New York, New York, February 25, 1955, 10:00 o'clock a.m.

Deposition before trial of William Wray, taken by Defendant, pursuant to Notice annexed hereto.

Appearances: Messrs. Lyon & Lyon, Esq., Attorneys for Plaintiff, 811 West 7th Street, Los Angeles, California, by Henry L. Burkitt, Esq., of Counsel and Ralph E. Meech, Esq., of Counsel. William J. Graham, Esq., Attorney for Defendant, 12 East 41st Street, New York, New York. [1]*

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties that the signing of the deposition be waived.

Mr. Burkitt: Mr. Graham, I think in opening

* Page numbers appearing at top of page of Original Deposition.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

I would like to make some statement regarding yesterday; the notice of taking these depositions, service was made February 4, 1955, is that correct?

Mr. Graham: That copy the reporter has will show the date service was made. February 5th. The notation I had here is February 4th, it wouldn't make very much difference one way or the other.

Mr. Burkitt: And I appeared here yesterday at the time appointed, February 24th, for the taking of the deposition of David Silberman, and was informed that the notice of taking depositions with the proof of service has not been received by you until February 23rd, isn't that correct?

Mr. Graham: That is correct.

Mr. Burkitt: And that no subpoena had been issued for David Silberman and that the deposition would not be taken, isn't that correct?

Mr. Graham: That is correct. I think I also stated to you that we would ask for permission of the Court to take the deposition of David Silberman after the trial of this action. [2]

Mr. Burkitt: Such an application is going to be made?

Mr. Graham: Such an application will be made and permission will be asked to file the deposition as part of the record and as part of the evidence in the trial.

Mr. Burkitt: That will be a matter for disposition at the time of trial?

Mr. Graham: That's right.

Defendant's Exhibit "AN"—(Continued)

WILLIAM WRAY

a witness, named in the annexed notice, being of lawful age, and being first duly sworn by a notary public of the State of New York in the above cause, testified on his oath as follows:

Direct Examination

Q. (By Mr. Graham): Please state your full name and address.

A. William Wray, 134 West 32nd Street, New York City.

Q. Mr. Wray, at one time were you interested in a corporation known as the Klosurette Corporation of America? A. I was.

Q. Do you recall when that corporation was organized? A. Oh, 1947.

Q. And do you recall what the paid in capital was of the corporation?

A. Actually paid in was two thousand dollars.

Q. Are you an officer of the corporation? [3]

A. I was.

Q. What office did you hold?

A. Treasurer.

Q. Where did that corporation have its place of business?

A. 239 West 17th Street.

Q. New York City? A. New York City.

Q. And what sort of quarters were occupied there by the corporation?

A. We had part of a loft, sub-leased from the people who had the whole loft.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Q. And what was the nature of the business carried on by that corporation?

A. We assembled zippers, mostly separators; separators is that certain style of zipper.

Q. When you say you assembled zippers, did you make any of the parts for the zippers, did you do any manufacturing?

A. The box that goes into a separator we made, that is what is called the component part.

Q. Did you have anything to do with the manufacturing of zipper chains? A. No.

Q. Did the corporation have any machinery for manufacturing zipper chain? A. No. [4]

Q. In order to carry on your business, you bought the parts that go into the making of zippers? A. No, we bought the chain.

Q. You bought the chain and then you assembled the chain?

A. We cut it to size and then made zippers from it.

Q. Now how many regular employees did the corporation have?

A. I believe it was three.

Q. Does that include yourself, or three in addition to yourself?

A. No, employees. We didn't consider ourselves employees. Let me elaborate on that statement, when I say three, as you have more work, you bring in people to help you and you pay them by the hour.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Q. But the regular employees were three in number? A. Three.

Q. Now were the assembled zippers sold by the corporation? A. They were.

Q. And in what market?

A. In the New York market.

Q. Do you recall the names of any of your suppliers, the people who supplied you with zipper chains?

A. Adams Industries, Apex, Stag Tool and Die, oh, several others I wouldn't know, but I will say that 75 per cent of the chain we used we bought from Adams Industries.

Q. Where are Adams Industries located? [5]

A. In Long Island City, the exact address I haven't got. I could look in the telephone book, they are in the telephone book.

Q. Now in carrying on the business of the Klosurette Corporation, did you have any contacts at any time with Talon, Inc., or any representative of Talon?

A. In 1948 I had an appointment at Jo Lane's place, which was at that time on 63rd Street, in New York City. I had an appointment at 3:00 o'clock that afternoon and when I came to Jo Lane I was with Mr. Swartz about two or three minutes and Mr. Meech was ushered into what they called at that time the board room. I was introduced to Mr. Meech.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Q. May I ask you to identify Jo Lane, what was the name of that?

A. Jo Lane Manufacturing Company.

Q. What business were they engaged in?

A. They were in the zipper business.

Q. Manufacturers of zipper chain?

A. I didn't know what they did; whether they made their own chain or bought their own chain, but I came there because Mr. Swartz at that time was not making separators and had given me a proposition that they wanted to consolidate with us or work out some arrangement where we would make separators jointly and that was why I came there.

Q. When you went to see Mr. Swartz, did you expect to [6] meet Mr. Meech?

A. I hadn't known Mr. Meech, I never had met Mr. Meech before.

Q. The Mr. Meech we are talking about is Ralph E. Meech?

A. I don't know him by the name of Ralph E. Meech, I know him by the name of Gus Meech.

Q. Did you and Mr. Meech have any conversation at the meeting?

A. Yes, Mr. Meech, after a few minutes, told me he was one of the men from Talon and that I was infringing on their product and I thought it was a huge joke, I laughed it off. I didn't know what he meant by infringing on them, and I said no, I couldn't infringe and he insisted I was infringing.

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

Q. Did you say you couldn't infringe?

A. I didn't, because I never had any machines there. It was known on the market that I didn't operate, I didn't make chain, because I was——

Mr. Burkitt: I want to object to these statements by Mr. Wray, which are the cogitations of his mind at that time and were not in the conversations between him and Mr. Meech and I will move to strike out the portion of the statement that has to do with anything except that he did not state to Mr. Meech his reasons.

Mr. Graham: Objection noted.

Q. Did you say to Mr. Meech that you did not have any machines? [7]

A. I don't remember whether I did or not.

Q. But you did tell him you were not infringing? A. Oh, definitely.

Q. Did you ask him what his basis was for charging you with infringement?

A. Yes, I recall that Mr. Meech had said, well, I am cutting some path in the market there. He had heard, Mr. Meech had heard that I am doing a very big job. I believe that was it.

Q. He said that to you?

A. Yes, that was the substance.

Q. In substance?

A. In substance, I don't know exactly how it came about, we were all discussing it, the three of us.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Q. Did he say anything about you manufacturing zipper chain?

A. Well, I believe he said I was infringing.

Q. Did he say he knew you were manufacturing zipper chains?

A. I don't know, I don't remember whether he did or not.

Q. But he did say you were cutting in on Talon's market?

A. Yes, the three of us were discussing that topic, John Swartz, whom I had known for quite a while, Mr. Meech and I. Mr. Meech, whom I had met for the first time.

Q. What position did Mr. Swartz hold with [8] Jo Lane Manufacturing Company?

A. I still don't know.

Q. He was an officer?

A. I don't even know whether he was an officer.

Q. He was one of the principals?

A. He appeared to me the main man in Jo Lane.

Q. Did you have any other conversation with Mr. Meech? A. That very day.

Q. That very day, did he say anything to you about Talon planning to bring suit against you?

A. Oh yes, yes, sure.

Q. Tell us what he said then in that connection. A. Mr. Swartz said to me——

Mr. Burkitt: Nothing about what Mr. Swartz said, please. Tell us what Mr. Meech said to you.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Mr. Meech: This was a meeting at which Mr. Swartz was present.

Mr. Burkitt: We don't want his statements here.

Mr. Graham: I think the question should be answered. You can note your objection.

Mr. Burkitt: I object.

Q. Will you state what Mr. Swartz said to you?

A. Mr. Swartz said to me, Talon company is going to sue me for infringement, that he, being very friendly toward me, and with the Talon people, he can help me. That was Mr. Swartz' [9] statement to me. Mr. Meech said nothing.

Q. What did you say when Mr. Swartz made that statement?

A. I laughed, I thought it was foolish.

Q. Did Mr. Meech say anything with respect to a suit?

A. Mr. Meech simply said I was infringing and they would have to take measures to protect themselves.

Q. When Mr. Swartz said that Talon was going to sue you, did Mr. Meech say anything at that time, did he deny they were going to sue you?

A. No, he didn't say a word.

Q. Did anybody make any statement that the suit would be very expensive? A. Oh, yes.

Q. Who made that statement?

A. Oh, yes, that was in the course of the conversation. We all, the three of us discussed that a patent suit is a very costly matter.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Q. Did Mr. Meech take part in that conversation?

A. I don't know, Mr. Meech says very little. He was present. He would either nod his head or, he doesn't do much talking.

Mr. Burkitt: I move to strike out all of his testimony having to do with Mr. Swartz' conversation with Mr. Wray.

Q. Now, did you hear anything further from Talon after [10] that meeting at Mr. Swartz' office?

A. Yes, about a month or two later I was, I received a registered letter.

Q. From Talon? A. From Talon.

Q. What were the contents of that letter?

A. Telling me I was infringing on a number of patents that they owned. I think there were either four or five patents that I was infringing upon which they owned.

Q. Did you respond to that letter?

A. I had seen Mr. Meech after that, since I then knew him.

Mr. Burkitt: I object to any statements unless the witness is going to answer the question.

The Witness: I can lead up to the question. I will answer that question.

Mr. Graham: Mr. Burkitt can note any objection he wants to. You go ahead and make your answer.

The Witness: I had known Mr. Meech, I had,

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

after receiving the letter, now that I had known him, I called the office but Mr. Meech was not in town that week and when he subsequently did come to town I spoke to him and I told him exactly the same thing, I says, "I am not running machines. You can come up to the place any time you want to." Well, he took an arbitrary position that I [11] was violating patents and that is all there was to it.

Q. Did he say that they were going to follow through, Talon was going to follow through and bring suit? A. Yes.

Q. Did they bring suit?

A. The very same year they brought suit, several months thereafter, I believe on the 31st of December of the very same year.

Q. 1948?

A. Right, the suit was commenced.

Q. Were you served with a summons at the time? A. I was served with a summons.

Q. Do you remember the court in which the suit was brought?

A. Southern District of New York.

Q. United States District Court for the Southern District of New York? A. That's right.

Q. Now after the suit was brought, was there any reference made to the suit in any of the trade papers?

A. Oh, yes, there was a big, full page, full column in the Women's Wear and Trade Record.

Q. That was probably in early 1949?

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

A. Yes.

Q. After the suit was brought did you have any difficulties [12] with any of your customers?

A. Oh sure. Some of them wouldn't continue.

Q. Will you state the nature of your difficulty?

A. Some of them read the article——

Mr. Burkitt: I object to that, he doesn't know whether they read the article.

Mr. Graham: You don't have to state whether they read the article.

The Witness: I have been told.

Mr. Burkitt: I object to testimony as to what somebody told him.

Q. Did any of your customers say they had read the article? A. They did.

Mr. Burkitt: I object also to that.

Q. What else did your customers say to you?

A. They can't take a chance doing business with me, they might also become involved with Talon.

Q. Did that have any effect upon your business?

A. Oh, sure.

Q. What effect did it have?

A. Some of the orders I had I gave back. The people who bought, I had them walk out on me. I had to go out and look for different business. It was just at the time I was building my business big. [13]

Q. Did you enter any defense to the suit?

A. Oh, sure. Sure, I defended the action and entered a counter claim.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Q. Did you engage a lawyer for that purpose?

A. I did.

Q. What was the name of that lawyer?

A. Frederick E. M. Ballen.

Q. You say you put in a counter claim. What was the basis for your counter claim?

A. That I wasn't infringing, that the suit was started against me to embarrass and harass me and, well, I imagine a lot of legal phraseology goes with it. I haven't got the papers before me.

Q. Did that suit eventually come to trial?

A. No, that suit was never tried.

Q. Did you have any conference with anybody representing Talon when the case was reached for trial?

A. I was examined before that by the attorneys for Talon on several occasions, I believe, and then there was another examination where the Talon people were examined by my attorney and that is all there was to it at that particular time.

Q. When was the case reached on the calendar for trial, do you recall that?

A. It was reached once in June, I believe, in 1951, and it was postponed to, I believe, September or October, because [14] the summer months came about.

Q. Do you recall who requested that postponement? A. We did.

Q. Your request was granted? A. Oh yes.

Q. Before the case came up again in October

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

or in the fall of 1951, were there any negotiations between Klosurette Corporation and Talon with respect to a settlement of the case?

A. I had seen Mr. Meech on several occasions and we discussed the matter. I says, "You know,"—oh, incidentally, they came to my place and saw I wasn't operating any machines, according to the facts that I gave them, that I bought the chain. I also gave them the information which was substantiated by invoices, whom I bought the chain from.

Q. Do you recall when that visit was to your place of business?

A. It was more than one visit. Several visits.

Q. Was that by your invitation or at the request of Talon?

A. Well, I invited Mr. Meech to my place once myself. Many a time I'd get a telephone call from Talon's attorneys. I said it's perfectly all right for you to come up here, any papers you want, any information you want, here it is.

Q. Now in any meeting that you had with Mr. Meech, did you discuss the possibility of settling the case? A. Oh sure. [15]

Q. Was the case ultimately settled?

A. Yes.

Q. Do you recall what the terms of the settlement were?

A. I received two thousand dollars to pay the legal expenses and releases, I imagine, were ex-

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

changed by the lawyers and that was the end of the case.

Q. Klosurette Corporation didn't consent to any decree?

A. No, there was no decree, no infringement.

Q. And Klosurette Corporation made no agreement with Talon to pay royalties, did they?

A. No, we didn't run the machine, that was the end of the case.

Q. Talon paid you two thousand dollars?

A. That's right.

Q. To defray legal expenses?

A. That's right.

Q. Is Klosurette Corporation of America still in business? A. No.

Q. Do you recall when it ceased doing business?

A. I imagine that year.

Q. 1951?

A. I don't remember whether it, whether the case was settled in 1950 or 1951, no, wait, it was 1951. After that I didn't want to be involved any further in any matters that I'd be at the mercy of anybody to come in and file suit with such [16] big expenses, so I just stepped out, that is all, discontinued. I paid everything and everybody and that was the end of it.

Mr. Graham: That is all I have.

Cross Examination

Q. (By Mr. Burkitt): Mr. Wray, when was the

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)
first time you showed one of these machines to a representative of Talon?

A. I didn't show him any machine, I had no machines to show.

Q. Wasn't there any machine at all in your premises at any time for making chain?

A. That Klosurette owned?

Q. I am talking about being on your premises.

A. There was a couple of machines that were owned by Wek Sales Company that were not in working condition, in other words, they were scrap. Wek owned a mortgage on a firm called Wing Slide Fastener Company that went broke.

Q. As a matter of fact these machines were on your premises from the time that Wek Sales——

A. They were not completed machines.

Q. But they were machines.

Q. They were not operating machines.

Q. But they were on your premises, is that correct?

A. I had part of a loft, somebody else's.

Q. Who was that somebody else? [17]

A. Victory Mask Company. And you could go in and out any way you wanted, but however there was a lot of junk in the place and none of it was workable.

Q. Before you took over those premises, Wing, that you mentioned, was the lessee, isn't that so?

A. Yes.

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

Q. And they had those machines on the premises at the time they were there, correct?

A. They didn't have it, when I took over Wek had it.

Q. Wek succeeded Wing?

A. Wek foreclosed on Wing.

Q. They took over the premises from Wing?

A. I took the premises, then Wek asked me will I permit them to store this whatever they want there until they have a sale and I did and they had their sale and they sold all the equipment, there were a lot of machines there.

Q. And there were chain machines involved?

A. That I don't know because I am not familiar with the making of chain or chain machines.

Q. All right then, we'll say there were zipper making machines included in that batch of Wing machinery, is that correct?

A. No, I bought my stringer from the outside market.

Q. I am not asking about your stringer. In this batch of machinery which was put in there by Wing or by Wek, there was [18] slide fastener or zipper machinery, isn't that so?

A. I don't know. I don't know what you would call zipper machinery. A zipper machine is a machine that will function.

Q. Only a machine that functions is a zipper machine, correct?

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

A. Anything that will work, that you can harness to work. I don't have to argue with you.

Q. There was some machinery from Wek or Wing?

A. There was a lot of machinery.

Q. At the time you took over the premises?

A. Yes, there was a complete machine shop there composed of maybe 10 or 15 types of machines, lathes, grinders.

Q. All of which didn't belong to you?

A. Exactly, it was not my property.

Q. When did you first tell this to a representative of Talon?

A. When the representative of Talon came to me they had sold most of this.

Q. Who were they?

A. Wek had sold most of their equipment, they were selling it piecemeal.

Q. But there still remained on your floor some machinery, right, at the time the representative of Talon came to you, correct?

A. That is possible, yes. [19]

Q. Which representative are you mentioning as a representative of Talon; Mr. Meech?

A. Another gentleman, I forget his name, the record will show who came, who originally came to my premises. I invited him.

Q. After the examination, wasn't that so?

A. I believe that was before the examination.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Q. There was somebody up to see you before the examination, to see the machines?

A. Yes, to look at the place.

Q. You don't remember who he was?

A. He worked for the firm of Burgess, Hicks and Ryan. He was an elderly gent, a gray haired fellow. I forget his name. The record will show.

Q. After the suit commenced? A. Yes.

Q. In other words no representative of Talon came to see you before the suit commenced?

A. Mr. Meech had come to my office at my invitation one day before the suit commenced. We had lunch together.

Q. Did you show him the machinery on the floor at that time?

A. I told Mr. Meech to go any place he wanted.

Q. Did you tell him the story about Wing and Wek at that time? [20]

A. Mr. Meech knew about it.

Q. Was there any succession at all between Wing and Wek and Klosurette?

A. None whatsoever, outside of the fact that I bought from Wek the lights, and some assembly equipment for the sum of, the whole thing ran to about fifteen hundred dollars, everything that I bought.

Q. Now about this box making equipment you were talking about, did you buy that from Wing or Wek?

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

A. I bought nothing from Wing. The box making equipment I made.

Q. You didn't get any box making equipment from Wek then?

A. No. That is on record in the Court, the conditions of the bill of sale, from Wek to me.

Q. Mr. Wray, I think you gave some figures to the attorneys for Talon as to your sales in the years 1948, 1949 and 1950. Now as I understood it, the beginning of the suit was at the very end of 1948, December, 1948? A. Yes.

Q. Now the figures that you gave, and I read them to you, totaled for 1948, $49,421.38 and for the year 1949, $59,439.39. Do you dispute those figures?

A. I didn't give them those figures; they looked at the books, they examined the books, my books, and they took those figures. [21]

Q. Your accountant was present at the time these figures were taken?

A. No, he was not present.

Q. Your accountant was not present?

A. My accountant was not present.

Q. What was your accountant's name?

A. I don't even know the name of the man, I don't think I had an accountant at that time, if I can remember right.

Q. Isn't it true that you were putting off the examination of your books as to the amounts of sales until your accountant had returned from California?

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

A. I had a friend of mine by the name of Louis Rothenberg who was a fellow, he was not a certified man, he was a good bookkeeper, he had worked for Wing at one time as a bookkeeper or something. When this matter came up I tried to get hold of him. I was told he was in California and subsequently when he came back I then called the office of Burgess, Hicks and Ryan and told them to come up to my place so they can work together with my man. That is how the accountant came into the picture.

Q. Your accountant was there at the time these figures were taken? A. I imagine so.

Q. Didn't you get copies of those figures?

A. I knew the figures, I didn't have to get copies. I was a two by four outfit. [22]

Q. Did you ever dispute those figures?

A. Never. I wasn't a big outfit that didn't know what was going on. I want you to understand, in 1949 my business should have been double the amount of 59 thousand, but because of this suit I lost that business. I explained it to Mr. Meech and I explained it to Mr. Gudges and I even explained it to Mr. McCoy.

Q. But the figures were still as I gave them to you?

A. If you say so, they are in the record, that is what it is.

Q. These figures, Mr. Wray, are part of the

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)
report made to the attorneys for Talon, showing the month by month——

A. I don't dispute any figures you have there, I don't dispute it at all. You can accept them.

Q. All right. Actually, Klosurette did, well, I would say, advance some money to a Mr. Wasserman, as what you called a loan against certain machines which were on your premises, isn't that so?

A. No sir.

Q. Well, what was the story about the money advanced to Mr. Wasserman?

A. Mr. Wasserman never was advanced any money. Mr. Wasserman was working for Klosurette.

Q. And there was some machines there, were they not given as security to Klosurette for money given to Mr. Wasserman? [23]

A. No, there is in your papers here, you have some information on a matter that took place before Klosurette went into business and they had, it wasn't Wasserman, it was Wing, I believe, if my memory serves me right, some sort of an export deal and they sold to some fellow by the name of Skitoni, some machinery and they assigned that sale, they assigned this invoice to Klosurette for some monies for some transaction there or for some interest that might have been there, I don't remember what the facts were, it's so far back, but the record will show it all there very clearly. If you

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

want to refresh my memory I will be able to go ahead with you on it.

Q. These machines you mentioned, weren't they on your premises at the time of this examination that took place back in November 30, 1949?

A. If they were, they were not completed machines is all I can tell you.

Q. Weren't they the machines also against which you had made this loan?

A. That deal never materialized.

Q. I am asking you as to the loan.

A. It might be if you refresh my memory there I will be able to go along with you.

Q. I will read from page 14 of the deposition in which the question was, "Getting back now to the Skitoni machines, you still have a loan against these machines, do you?", your answer [24] was, "I do." Question, "What is the nature of the protection that you carry on that loan?", answer, "As soon as Skitoni takes those machines I am to be repaid." Question, "Have you any interest in the machines as a result of that loan?", answer, "No sir." Were those machines at that time in your possession?

A. I don't know whether they were or not.

Q. You were telling us a little while ago it was an assignment of the invoice to your company.

A. That's right.

Q. And as a part of the invoice, weren't the machines also retained by you?

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

A. The machines were never delivered.

Q. To you? A. To Skitoni.

Q. They were kept by you, were they not?

A. No, they were never made.

Q. Weren't they on your premises at any time?

A. I don't think so, if they were they were not completed machines. That is the reason that deal was never consummated. You have a copy of the invoice.

Q. I will read you a question, just a minute, on page 17 of your deposition, you were asked, regarding the Skitoni machines, the question was, "Were these machines ever on the premises of Klosurette Corporation?", your answer, "Yes."

A. Does it say anything about whether those machines were completed or not? [25]

Q. You had stated in here, the machines didn't have motors, was that what you considered to be incomplete machines?

A. They not only didn't have motors, they didn't have a lot of other things.

Q. Were the machines in your possession at that time?

A. I don't know, I imagine they would be.

Q. These machines were standing around on the floor there, isn't that so, at the time the suit was commenced, on the floor of Klosurette?

A. There were some unfinished machines in my premises. They never worked, they were never oper-

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

ating. I never owned them. Some money was advanced on this invoice, on the shipping invoice.

Q. Do you have any connection at all with Union Slide Fastener, Inc., the defendant in this action?

A. I have not. I don't even know Mr. Lipson, I never met him.

Q. Mr. Wray, you mentioned an article in the trade journal, which trade journal was that?

A. Women's Wear and Trade Record.

Q. Did you have a whole bunch of copies made of that article?

A. I am referring to the article that appeared in the paper when Talon commenced the suit against us. [26]

Q. What article did you have copies made of?

A. To counter and offset the damage done by Talon to me, I then went back to the same papers and I said to them, when my answer goes in you must give me the same space.

Q. Did they?

A. Not exactly the same space, but they printed the article.

Q. They did print the article?

A. They did.

Q. And you distributed it?

A. I had a lot of it, I blew it up this big and I went to everyone of my customers and I gave everyone of my customers one. Whoever came into the place got one.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Q. You were telling the world about the suit against you, weren't you?

A. I had no alternative. I was in a bad spot.

Q. Weren't you telling the world about the suit against you?

A. I didn't tell the world but I told the customers in New York, but I had to fight with those newspapers to get the article in. They didn't want to take it, they refused and I said I am going to fight you, you put Talon's in and I want mine put in.

Q. They did put your article in?

A. They did.

Q. You reproduced it and spread it around to all of your customers? [27] A. I did.

Q. You said there were several occasions on which you were examined. There was only one occasion, isn't that correct?

A. I don't remember, I think I was down to Burgess, Hicks and Ryan on several occasions.

Q. The only date that I have here, Mr. Wray, is November 30, 1949. Do you know of any other date?

A. I don't know what the dates are, I know I was in that office on several occasions. That is all I can tell you.

Mr. Meech: Mr. Wray, did you ever have any connection with Wing Slide Fastener Company?

The Witness: I didn't know Wing.

Mr. Meech: To the best of your knowledge, did Wing ever manufacture fasteners, stringers?

Defendant's Exhibit "AN"—(Continued)
(Deposition of William Wray.)

The Witness: To the best of my knowledge I don't think that Wing manufactured anything at any time because Wing went broke after having the finance company and creditors in there for over a hundred thousand dollars.

Q. Did you know about their activities?

A. I didn't know them.

Q. You are just speaking from somebody's statement to you that they went broke for a hundred thousand dollars? A. Somebody else.

Q. Somebody else told you? [28]

A. The bank told me, prior to that I didn't know.

Q. You didn't even know they were in business?

A. I didn't even know they were in business.

Mr. Graham: Mr. Burkitt, you had copies of the record in the Klosurette suit, I wonder if we can stipulate as to the patent in the Klosurette suit, Talon against Klosurette.

Mr. Burkitt: I think you can, I don't have the whole record, particularly Mr. Wray's examination.

Mr. Graham: If you recall, Mr. Wray, you don't have a copy of the complaint?

The Witness: There were four or five of them. I don't know, there were a lot of big numbers in there.

Mr. Graham: Do you recall whether Smith patent was one of them?

The Witness: I imagine.

Mr. Burkitt: You don't know, do you?

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

The Witness: Offhand I don't know.

Mr. Graham: Do you remember the names of any patentees, do you remember Pooks?

The Witness: Pooks registers in my mind.

Mr. Graham: Was there more than one Pooks patent?

The Witness: I think so.

Mr. Graham: Was the number of Pooks patents maybe five or six?

The Witness: One name called for two patents.

Mr. Graham: Mr. Burkitt wants you to get certified copies of the record, so we will have more expense.

The Witness: Your office has it.

Mr. Burkitt: Mr. McCoy will stipulate that with you at any time.

Mr. Graham: That is all I have.

Mr. Burkitt: You are appearing here without subpoena, correct?

The Witness: Let me put it clear, when I was finally contacted I said this was——

Mr. Burkitt: Can't you answer my simple question?

The Witness: I don't want to answer, you know why I don't want to answer the way you want me to answer. I will be perfectly candid with you, I was told I was going to be subpoenaed. I didn't want to be annoyed, I didn't want to be bothered. I said tell me when you want me and I will be there.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Mr. Burkitt: You discussed this matter at length with Mr. Graham before?

The Witness: I had discussed no matter with anybody. I have no reason to want to discuss it. I don't want to discuss it. As a matter of fact I discussed it with Mr. Meech and I said to Mr. Meech on more than one occasion, "Let's get together and settle this blamed thing so both of the people will be satisfied and continue trying to make [30] a living," and Mr. Meech said——

Mr. Burkitt: All right.

The Witness: That is what I wanted you to know.

Mr. Graham: What did Mr. Meech say?

The Witness: Mr. Meech said, "I will present it to management. Management has been hurt in this matter a whole lot. Management feels sore. I will go back again and I will try to explain the situation to them." Up until last week I prevailed upon Mr. Meech to push through the settlement because the cost of a trial of this kind is very expensive.

Mr. Graham: For both parties.

The Witness: Definitely.

Mr. Meech: Was that approach being made in the interest of Union?

The Witness: No, in your interest as well.

Mr. Burkitt: When was the last time you saw Mr. Graham?

The Witness: Mr. Graham, yesterday.

Defendant's Exhibit "AN"—(Continued)

(Deposition of William Wray.)

Mr. Burkitt: At this office?

The Witness: At this office. He said to me, "Your examination is for tomorrow, not for today."

Mr. Burkitt: And that is all that happened?

The Witness: That is all that happened.

Mr. Burkitt: When did you see him before that?

The Witness: I spoke to him on the telephone.

Mr. Burkitt: When did you see him before that?

The Witness: Once before that.

Mr. Burkitt: How long back?

The Witness: Oh, several weeks ago, maybe longer.

Mr. Burkitt: Here in this office?

The Witness: Once for five minutes in this office.

Mr. Burkitt: Was the five minute call also a telephone call?

The Witness: It was in this office.

Mr. Burkitt: That was not the telephone call you said you had since your last meeting?

The Witness: I called him and he was not in the office. He was in court.

Mr. Burkitt: And that is the total of your conversations with Mr. Graham?

The Witness: Yes, that is the total.

(Whereupon at 11:05 o'clock a.m., the examination was closed.) [32]

[Endorsed]: Filed March 1, 1955.

DEFENDANT'S EXHIBIT "BR"

[Title of District Court and Cause.]

DEPOSITION OF ISADORE NAPP

Deposition suite, offices of Verlon L. Polk & Associates, 541 S. Spring Street, Suites 316-17, Los Angeles 13, California, Wednesday, July 20, 1955, 11:30 a.m.

Appearances: For the Plaintiff: None. For the Defendant: Allan D. Mockabee, Esq., Attorney at Law, 4063 Radford Avenue, Studio City, California, Poplar 6-1389. [1]*

Proceedings

Whereupon,

ISADORE NAPP

a witness called by and on behalf of the Defendant, after being first sworn by Vernon L. Polk, CSR, a notary public in and for the County of Los Angeles, State of California, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mockabee): Mr. Napp, will you please state your full name and address?

A. Isadore O. Napp, 839 South Los Angeles Street.

Q. What is your home address?

A. 138 North Carmelina.

Q. Is that in Los Angeles? A. Yes.

Q. I believe you are familiar, Mr. Napp, with

* Page numbers appearing at top of page of Original Deposition.

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

the fact that you are to be asked questions. Now that you have been sworn in, the notary will take down the answers, as well as my questions, and you will be given a copy of the deposition to check over and sign, before a notary, and it will become part of the record in Talon, Inc. v. Union Slide Fastener, Inc., which is now pending in the Federal Court here in Los Angeles. From that, and having given a deposition before, I believe, do I understand you know exactly what the nature of this proceedings is?

A. I don't know exactly, but I have a fair idea.

Q. That it is a suit for infringement? [2]

A. On patents, I understand.

Q. Brought by Talon, Inc. against Union Slide Fastener? A. Yes.

Q. Are you aware that this litigation is being investigated by the Antitrust Division of the Department of Justice?

A. Mr. Lipson just showed me a letter, prior to the time I came in here, about that.

Q. A letter from the Department of Justice?

A. Right.

Q. Do you recall what it said?

A. I glanced it over and the contents of the letter, that they request some information from the attorney and the outcome of the court, in regard to the anti-Sherman law, I believe.

Q. Are you the sole proprietor of the Roxy Thread Company? A. Yes, sir.

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

Q. Are you the general manager of its activities? A. No.

Q. Who is?

A. I have different people in different departments.

Q. But you supervise the whole operation?

A. Right.

Q. Isn't that true? What is the principal product of your company?

A. The manufacture of threads and zippers.

Q. How long have you engaged in the manufacture of zippers?

A. About 1940, I believe. [3]

Q. Had you been in any way associated with the zipper industry prior to that time? A. No.

Q. I believe in your deposition dated November 25, 1952, in which you gave testimony in this same case, you testified that you had been in the slide fastener business since 1934?

A. I said I had been in business in California since 1934.

Q. But you were not in the slide fastener business all that time? A. No.

Q. Were there any other slide fastener manufacturers in California at the time you started in the manufacture of zippers?

A. Not to my knowledge, unless the Talon assembly plant was called a manufacturing——

Q. They had an assembly plant here at that time?

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

A. Either here or in San Francisco.

Q. Have you been engaged in the manufacture of zippers since you state that you started in 1940?

A. Right.

Q. When you speak of the manufacture of zippers, was your firm producing zipper stringers and assembling them into zippers, since 1940?

A. Right.

Q. Do you operate under a license agreement with the Prentice Corporation? [4] A. I do.

Q. Or the Prentice Manufacturing Company?

A. It is a license agreement with the Prentice Corporation, yes.

Q. How long have you operated under that license? A. Since 1940.

Q. Do you have a copy of that license with you?

A. That license agreement that I have is not with the Prentice Corporation, but it is with the Stronghold Fastener Company.

Q. Who is Stronghold?

A. The Stronghold is a company that I believe are out of business now, and they were the ones that had the license agreement with the Prentice Company, and I bought that company out and they had the consent of the Prentice people to transfer that agreement.

Q. Do you have that license with you?

A. I haven't got it with me, and I don't even know where I could find it.

Q. Did you search for it before you came up

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

here? A. I sure did.

Q. In general, what did the license provide?

A. That we have the right to manufacture slide fasteners, under the license of the Prentice methods.

Q. Did it list any patents under which you were licensed? A. I don't recollect that.

Q. How did it identify the Prentice methods in the license, [5] in other words, so you would know what operation you were licensed to perform?

A. It's been so long, that I don't remember. It could be, and then I wouldn't remember, being so long ago, I do not recollect the exact patents, or if they had any patents.

Q. You see, in the grant of a license, you are paying something, usually in the form of royalties, for the right to make, sell, or use something. Do you recall what rights you acquired, in other words, under that license?

A. Acquired rights to use their machinery, use their methods.

Q. To use Prentice machinery, is that right?

A. That's right.

Q. Did you buy the machinery from Prentice?

A. No.

Q. You leased it? A. Yes.

Q. Do you still lease it from Prentice?

A. Yes.

Q. Do you know where those machines are made? A. Not the least idea.

Q. You get them from the Prentice Company,

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

is that correct? A. That's right.

Q. Do you pay a flat monthly rate for their use, or do you pay for them in accordance with the production of the machines?

A. Both. We pay a rental for the machinery, and a royalty based on sales. [6]

Q. Do you recall the amount of rent and royalty? A. Pardon?

Q. Do you recall the amount of rental and the amount of royalty?

A. The exact rental I don't recall, but I know it is 2 per cent royalty on sales. I think the rent is $500.00, for three months, but the exact figure, I couldn't——

Q. On each machine?

A. No, on the amount we have.

Q. How many machines do you have?

A. Nine.

Q. Do you have any license agreement from the Talon Corporation? A. No.

Q. Do you have any sort of an understanding, license written or verbal, with Talon? A. No.

Q. Has Talon or any representative of Talon ever discussed with you the manufacture and production of zipper stringers? A. No.

Q. Have you ever been promised by Talon or any of its representatives that your firm will not be bothered about patent infringement?

A. No.

Q. As a pioneer in the zipper industry in this

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

area, you are [7] undoubtedly familiar with the zipper trade and the various processes involved in their production, are you not?

A. Well, I don't know. If you make it more specific, put your question so I would know what you are asking; you are asking a broad question.

Q. I say are you familiar with any of the production methods and machines?

A. No, I am not; just by hearsay, or glancing at some, at some machinery.

Q. Where have you seen other machines?

A. At the California Slide Fastener.

Q. Do you know what type of machines they have?

A. They were supposed to have been a product of Silberman's Machinery.

Q. What Silberman do you mean?

A. David Silberman.

Q. Is he a zipper machine manufacturer?

A. He is supposed to be one. I don't know whether he manufactures them or not.

Q. Have you ever seen a patent to David Silberman on a zipper machine?

A. The only patents, papers I have seen, are the ones that Mr. Lipson showed me up at my house, a few weeks ago.

Q. From your examination of that, could you determine what type of machine it was? [8]

A. I am not qualified to determine anything, because I am not a mechanical engineer.

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

Q. I hand you a copy of Silberman Patent No. 2437793 issued March 16, 1948, and ask you if that is the same as the patent copy which was shown to you by Mr. Lipson?

A. I believe it is. I wouldn't swear to it. I believe it is.

Q. Are you familiar with the Conmar type of zipper machine? A. No, I am not.

Q. Have you seen any other machine beside the Silberman machine? A. That's about all.

Q. Are you familiar at all with the different shapes of zipper elements put out by other manufacturers?

A. I am familiar with the shapes of the different elements, but just by looking at the product, the finished product.

Q. How do they differ from yours?

A. Well, some have square edges, some have rounded edge.

Q. What type is yours?

A. The rounded edge.

Q. I hand you a photostat on which several drawings are represented, and across the center at the right-hand side there is a drawing marked "Legat #2,116,726 2 alternative strips," period. You will note the strip at the right, which shows a completed element before and after it is clamped on a tape. The dotted lines show the element [9] after it is clamped in place.

Will you, from the manner in which you have

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

just described the different shapes of elements, identify the type shown in that photostat? Is it round or square?

A. If that drawing with a dotted line represents the finished unit, I would say that is a round element. But I am not a blueprint reader, so—I am not a blueprint reader, but the edge over here seems to be square.

Mr. Mockabee: Off the record.

(Discussion off the record.)

The Witness: I am not a blueprint reader. I don't know how to read blueprints, but if that dotted line represents the finished unit, then that would be a round-edge unit.

Mr. Mockabee: I offer the photostat identified by the witness, as Defendant's Exhibit A.

(Photostatic copy of drawing worded at lower right-hand corner "July 17, 1955, Drawn by P. Lipson" was marked Defendant's Exhibit A to the deposition and will be found bound at the end of this deposition.)

Q. (By Mr. Mockabee): Is the manufacturing method used by Crown Corporation to make Crown zippers similar to the Prentice method?

A. I wouldn't know.

Q. Have you ever heard how Crown zippers are made?

A. I heard that it is a die cast method. [10]

Q. As a man who was in business probably for sometime before you entered into the Prentice li-

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

cense or purchased the Prentice license from Stronghold, is it? A. Right.

Q. Did you make any investigation of other methods of production before purchasing that license? A. No.

Q. Did you know anything about the quality of other methods and machines at that time?

A. No.

Q. What prompted you to purchase the Prentice license?

A. It was Stronghold Fastener Company started cutting prices, on zippers, and at that time we were handling the Waldes Kover-Zip, and it was cheaper to buy him out than keep on fighting with him.

Q. Weren't you familiar with the Waldes zipper and its manufacture?

A. Waldes used the Prentice method.

Q. Referring to the photostat, Exhibit A, and that portion to which we referred and marked "Legat #2.116.726," does that drawing show anything at all similar to the Prentice method of manufacture?

A. That drawing wouldn't show anything.

Q. It shows a portion of a strip with recesses and projections, and it shows at the right hand of the strip, a formed zipper element, is that correct?

A. The complete element. [11]

Q. Is that made in any way like those manufactured under the Prentice method?

A. I wouldn't know that.

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

Q. Does it look anything like the zippers you make?

A. Yes, the complete unit, and that's specifically on this particular end of the drawing here (pointing). I wish you would circle it and mark it, so that there will be no misunderstanding.

(Document marked by Mr. Mockabee.)

Q. (By Mr. Mockabee): As similar to the elements you manufacture?

A. Yes, the shape of the element I manufacture.

Q. I hand you a zipper and ask you if you can identify that.

A. What do you mean by "identification"?

Q. Do you know what type zipper it is?

A. No, I don't.

Q. Do you think it looks like a Talon zipper?

A. Talon makes more than one kind of a zipper.

Q. Do you think it looks like any of the Talon zippers? A. Not those I have seen.

Q. Do you think it looks like a Prentice zipper?

A. It looks more like a Prentice zipper, a Prentice element.

Q. Do the elements on that zipper have square heads or round heads?

A. I would call that a round-edge unit.

Q. I said round heads. Would round shoulder be a better term? [12]

A. Round edge I think would be the better term.

Q. Edge?

A. Yes, because the edge represents the outside

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

of the unit, and that is what I am talking about.

Mr. Mockabee: I offer a zipper just examined by the witness as Defendant's Exhibit B.

(The zipper above referred to was marked Defendant's Exhibit B to the deposition and will be found bound at the end of this deposition.)

Q. (By Mr. Mockabee): Did you first lease machines from Prentice in 1940? A. Yes.

Q. Did those machines have mechanism for intermittently feeding a flat band or strip of material into the machine or die or towards the punches on the ram? A. Yes.

Q. Was the machine for producing these zippers called an eccentric press?

A. I call it a punch press; I don't know what anybody else would call it.

Q. Did it have an eccentric movement in it?

A. What is your definition of an eccentric movement?

Q. Did it have cams on the main shaft and connecting rods to operate the mechanism?

A. No. [13]

Q. What operated the ram?

A. The drive shaft on the flywheel.

Q. How was the ram connected to the drive-wheel?

A. I don't know. I know it was offset, to give that up-and-down motion.

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

Q. And there was a member connected from the ram to the driveshaft, is that right?

A. I wouldn't know. Like I told you before, I am not a mechanical engineer, and I wouldn't know the workings of it.

Q. No, I am speaking just of the observation of the machinery in your shop.

A. It was just like a punch press going up and down.

Q. Were there elements on the main shaft that were offset from the center line?

A. The shaft, the shaft itself.

Q. Was a crankshaft, in other words?

A. That's right.

Q. And connected with the ram?

A. That's right.

Q. And the ram moved vertically?

A. That's right.

Q. And of course the press had a base?

A. It was all one unit.

Q. And the ram or the ram block was guided by gibs, or vertical guide posts? [14]

A. I wouldn't know. You are asking me questions I can't answer, Counsel, because I wouldn't know the workings of the mechanics of that machine.

Q. Did the ram move?

A. Just up and down.

Q. In a straight line?

A. In a straight line, that's all I know.

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

Q. Did those first machines have rollers for feeding the metal strip to the machine?

A. I still wouldn't know.

Q. Did it have any rollers on it at all?

A. It had rollers, lots of rollers. I don't know what they were for.

Q. But there was something there that fed the strip in?

A. I couldn't answer that either.

Q. Well, you know that it makes the elements out of a strip of material?

A. I know that it is made out of the strip of material going onto the tape. How it happened, I don't know.

Q. Just a smooth flat strip feeds in there?

* * * * *

A. All I know, it cost me so much to manufacture, and I sold it at a certain price that showed me a profit, and that was why I was interested in buying that license from Silberman.

Q. Before you purchased this Prentice license from the Stronghold Company, did you examine the method, cost and speed of production and the potential profits you could expect? [15-16]

A. No, I didn't go into details of examining the methods, but I did go into details as to the cost of manufacturing, and I knew what the selling cost was.

Q. So you knew about what your profits might be? A. That's right.

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

Q. Were any changes made in your machines after the time you started in production?

A. On my machines?

Q. Yes. A. No, not that I know of.

Q. They are the same machines?

A. They are not the same, no; we got different machines.

Q. Did you get those from Prentice also?

A. Yes.

Q. What was the difference between the original machines that you had and the new ones?

A. Higher speed.

Q. How much more speed were the new ones?

A. If I can recollect correctly, I believe the old machines were about 450, and the new ones, about 1,700, approximately.

Q. I realize you are not a mechanic, but is it true of both the old machines and the new machines that you fed in your strip of material and it was operated on by the machine to make zipper elements and fasten them to a tape in space relation? A. That's right. [17]

Q. Were these changes of the machines made merely to speed up production, or for any other reason?

A. I wouldn't know. Production is the thing that interests me.

Q. Who brought about the change? Was it at the suggestion of Prentice, or was it at your request?

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

A. The Prentice people were working on a machine to increase the speed for years, and when they developed it, and we found out about it, I requested we wanted those machines.

Q. When did you get the new machines?

A. I think about five or six years ago.

Q. Do you have any record of the receipt of those machines?

A. I haven't looked, but I am almost sure it is about six years.

Q. I think I asked you for that in the subpoena. Can you produce those records?

A. I don't know. I will have to look for them.

Q. Do you know if the new machines produced any better zipper than the old machines?

A. I wouldn't know that either. I know that you have to have a good zipper in order to sell it, and we didn't have any trouble with these. We didn't have any trouble with the old ones. I wouldn't know.

Q. Did you get these new machines to meet an expanding market and competitive prices?

A. Correct.

Q. Have you at your place of business made any changes in the machines furnished you by Prentice? [18] A. No.

Q. Does Prentice ever from time to time furnish you with replacement parts which are improvements over the parts which they take the place of?

A. Well, our method of operation, any time a

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

part wears out on their machines, we have to replace it with a part that they manufacture. If it is an improvement or not, that I can't tell you.

Q. Now the metal strip that you buy for the manufacture of zipper elements is of a flat band type .090 wide by .030 thick, is that correct?

A. We don't use that size. We use a hundred by thirty.

Q. A hundred by thirty. Is that the same size you were using in the old-type machines?

A. Yes.

Q. Where do you buy your metal strip?

A. Aluminum Company of America.

Q. Have you always purchased it from them?

A. Yes.

Q. And——

A. And pardon me, when we order metal from the Aluminum Company of America, we specify them to run the metal through the Prentice dies.

Q. Aluminum Company has Prentice dies there to—— A. I believe so.

Q. ——to gauge their metal with, is that true? About the time [19] the war ended or in 1945, were your machines operating at 1,700 r.p.m.?

A. 1945—that's 10 years ago. No, they were not operating at that speed. They were slow speed.

Q. What speed was that?

A. About 450, I believe.

Q. About 450. Let me see, your faster machines, which ran at 1,700, were acquired then about 1949,

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

is that correct? A. About that.

Q. Did the acquisition of these newer faster machines in any way affect the price at which you could put out your zippers?

A. It reduced our cost.

Q. Well, did you reduce your price then accordingly?

A. We had to reduce our prices on account of competition.

Q. Before you got machines from Prentice, the new machines I mean, did you see any of the new-type machines any place else? A. No.

Q. You didn't visit the Prentice plant or——

A. I visited the Prentice plant, I knew they were working on the machines, but to me, they all looked alike.

Q. Did you see any machines prior to 1949 which were identified to you as the new Prentice machines?

A. No. I have seen the machine, the experimental machine in the Prentice plant; that's about all.

Q. When was that?

A. That was right after the war, 1945, '46, something like that. [20]

Q. That experimental machine you are speaking of was the one that upped the speed to 1,700, wasn't it?

A. I wouldn't know that. I know it was a faster-type machine, but the speed, I wouldn't know.

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

Q. But it was your understanding that the new machines you got were of the type, same type as the one you saw?

A. They told me they expected that machine to do better than a thousand units per minute.

Q. And as far as you know, that was the same type machine? A. I believe so.

Q. Before you began using the new machines, do you remember what you were selling your 7-inch zipper for? A. I don't remember that.

Q. I hand you a little card marked "price list, Roxy Slide Fasteners" and shows listings from 7 inches to 36 inches, and prices from 4½ cents for the 7-inch zipper to 16¼ cents for the 36-inch zipper, and ask you if you can identify that card?

A. I can't identify the card, and I couldn't even identify the prices. I don't even know what date it was.

Q. Do you recall at the time you met with representatives of the Talon Company and representatives of California Slide Fastener and Union Slide Fastener in the offices of Talon in Los Angeles, in 1949, that you handed the persons present cards listing your prices at that time?

A. I don't recollect handing the persons present any cards. [21] I do believe, however, that there was a question asked what the prices were, and I believe I submitted them, to the people present at that meeting.

Q. Does that card look familiar to you as one

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

of the cards that you used to submit the prices?

A. I couldn't—it is a blank card. I wouldn't know, and I don't remember at that time what the prices were. I would have to look them up.

Q. Well, did you hand out some cards of that type? I don't mean that card necessarily.

A. I don't recollect that; I am sorry.

Q. It doesn't look at all familiar to you?

A. Any card with a price list on it wouldn't look familiar to me, because I don't know who wrote it, I don't know who sent it, and I don't know where it was gotten at.

Q. But did you hand out price lists on cards at that time?

A. I don't recollect that. I remember having the price structure with me, and it was an open book, there was no secret about it, what the prices were, and I told them what the prices were.

Q. I realize that is a long time ago and a lot has happened since.

A. But I don't know. It is the same as if I showed it to you; would you be able to tell me, if it came out of your office?

Q. As I said, I realize it was quite a while ago, but I was just wondering—— [22]

A. I don't recollect that. I would be glad to go back to the records and see what the price structure was in 1949, and give them to you, or give them to the court, as far as I am concerned.

Q. Do you recall that Talon reduced its prices

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

on 7-inch pin lock aluminum zippers, skirt zippers, to 5 cents in the summer of 1949, and for that reason you reduced your prices on those zippers to 4½ cents?

A. I wouldn't recollect the exact dating on it, but when the reduction was made by the major companies, was made to 5 cents, we had to reduce them to 4½, whatever the date was.

Q. Was that at the same time the major companies reduced theirs? A. I believe so.

Q. Did California Slide Fastener and Union Slide Fastener reduce their prices also?

A. I never know what their prices were. They haven't got one price.

Q. Was the 4½ cents price on the 7-inch zipper a stable price, or were any further reductions made to say 4¼ cents or 4 cents?

A. I don't know the exact dates of different prices, but I know there were other fasteners sold on the market below those prices.

Q. Did you reduce yours below 4½ cents?

A. At what time?

Q. In 1949. [23]

A. I wouldn't be able to answer that, no sir, without looking up records.

Q. Or at any time, do you remember a price that you charged less than 4½ cents?

A. Charging less than that right now for them.

Q. How much? A. Three and a half.

Q. How long have you been charging that price?

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

A. I would have to look up the records on that.

Q. I mean approximately.

A. I don't know; six months, seven months.

Q. Do you know, roughly, how far back it has been since you reduced from 4½ cents?

A. No, that would be hard to tell.

Q. You think it might have been two years ago, three years ago?

A. I still would have to look up the records.

Q. Do you recall at the meeting I referred to in the local Talon offices on September 30, 1949 whether there was any discussion about the stabilizing of zipper prices? A. I can't recall it.

Q. What was the purpose of that meeting?

A. I don't know what the purpose of the meeting was, but there was a question I believe at that time about another zipper coming out to the Coast here, to be manufactured by the Talon people. I believe [24] the name was Wilzip, below the price of the Talon fastener, and there were rumors they were going to bring the zipper here to the Pacific Coast. And I believe the whole topic of conversation was to try to ask Talon people to try and keep Wilzip out of this market here, if possible.

Q. What reason did they give for bringing the Wilzip out here?

A. I don't believe they gave any reasons for bringing the zipper out here, because they didn't have it out here.

Q. Who called that meeting?

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

A. I don't know.

Q. How did you happen to get there?

A. I had a telephone call from Mr. Eisenberg, I believe, there was going to be a meeting. I was to tell him if I would attend. I don't know whether Mr. Lipson called or not. I remember Mr. Eisenberg calling.

Q. Was that all that was said, that Talon was going to bring the Wilzip out?

A. That was the topic of conversation.

Q. And you don't recall any reason given for bringing it out here, is that true?

A. They were not here with the zipper yet.

Q. They had the Talon zipper here?

A. They had the Talon; they didn't have the Wilzip.

Q. Why was it they had to call a meeting, to tell the competitors they were going to bring a new zipper out?

A. I don't know who called the meeting. [25]

Q. Who presided at the meeting?

A. I don't think anybody presided at the meeting.

Q. Who did most of the talking?

A. I did.

Q. You did? What were you talking about?

A. Trying to sell them the idea they shouldn't bring the Wilzip out here, it wasn't necessary.

Q. What do you mean by wasn't necessary?

A. That the competition wasn't of that nature,

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

out here, and I think the boys were trying to uphold the price and make a living out of the zipper industry.

Q. Did either Mr. Yeager or Mr. Detweiler of Talon say anything about trying to uphold the price?

A. I don't believe they did; I don't believe they did. I can't recollect, though.

Q. In other words, you merely got together in Talon's offices and Talon said for no reason at all, said they were going to bring out the Wilzip zipper, is that true?

A. They didn't say anything.

Q. How do you know the Wilzip zipper was around? A. There were rumors around.

Q. Did either Mr. Yeager or Mr. Detweiler say anything about introduction of the Wilzip zipper back East and its effect on smaller manufacturers?

A. Not that I recall. [26]

Q. Now, this improved machine that we referred to, of the type which you now have in your factory, and of the type which you saw at Prentice, is it not a machine into which you feed metal strip and tape and which forms zipper elements and attaches them to the tape?

A. Well, that's the same answer: yes, it goes for the old-type machine too.

Q. And that same improved machine which is the type you have, and the type that they have at Prentice, this experimental machine, operated at

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

1,700, is that right? A. That's right.

Q. Have you talked to anyone other than Mr. Hepworth about the matter of this testimony?

A. I haven't talked to anybody. I haven't even talked to Mr. Hepworth about this testimony.

Pardon me, I spoke to the Prentice people, and I told them that I got this subpoena, and I asked them what kind of information they can get out of me, when they can get all of the information out of them; they have all the drawings and papers available; and they tell me that Mr. Lipson called them on the phone, and they would get in touch with their attorneys, Eastern attorneys. That's about all the conversation I had with anybody. (This entire paragraph doesn't register and doesn't make sense to me. I.O.N.)

Q. Did they tell you that they had informed Mr. Lipson that you could testify regarding the machines?

A. They did not. They wrote me a letter, on June 22nd. The contents of the letter: [27]

"Dear Mr. Napp:

"Sometime ago you advised us that you were invited to testify in court regarding the Prentice zipper machine owned by our company which you operate in California under our license. Please be advised that under our exclusive agreement with the Roxy Thread Company, you understand that our machines employ special methods and develop know-how that should not be known or divulged to

Defendant's Exhibit "BR"—(Continued)
(Deposition of Isadore Napp.)

anyone except your own mechanic employees."

And as a matter of fact, the employees that are employed in my place today were taken from the Prentice plant, and I didn't divulge anything to anybody, because I don't know what to divulge.

And signed by Mr. Trup, president.

Q. It was my understanding that let's see, around 1945, you had machines that operated as fast as 1,700 r.p.m., is that true?

A. That's not so.

Q. How fast did they operate at that time?

A. About 450.

Q. You didn't have any that operated at 1,200?

A. No.

Q. Not even a thousand? A. No.

Q. Has anyone at any time discussed with you the matter of giving testimony in this litigation?

A. No, except Mr. Lipson was over at my house a few weeks ago, and he discussed with me about testifying in this case, and I [28] explained to him at that time for him to get the proper knowledge and the actual workings of the machine, take the matter up with the Prentice people, that I was sure they would be able to give him all the information he was looking for.

Q. Have you ever discussed any phase of this litigation with anyone at the offices of Lyon & Lyon, anyone connected with those offices? A. No.

Q. With Mr. Meech of the Talon Corporation?

A. Mr. Who?

Defendant's Exhibit "BR"—(Continued)

(Deposition of Isadore Napp.)

Q. Meech. A. I don't know him.

Q. With an attorney by the name of McCoy in Cleveland? A. I don't know the gentleman.

Q. You have never discussed the case at all with any of those people?

A. I don't know them, never heard their names before.

Q. Or any representative of the Talon Corporation? A. No.

Mr. Mockabee: I believe that's all. Thank you very much, Mr. Napp.

(Deposition of Witness Napp concluded at 12:35 p.m.) [29]

Signature of Witness

The undersigned certifies that he has read the foregoing testimony adduced at the place and on the date shown in the above-entitled cause; that the twenty-nine (29) pages of testimony constitute a full, true and correct transcription of said testimony; and that changes, alterations or modifications, if any, have been noted by the notary public, Florence J. Farnsworth, at my suggestion, and initialed by me in each instance.

Los Angeles, California, 8/9/1955.

/s/ ISADORE NAPP,
Deponent. [30]

[Endorsed]: Filed Sept. 27, 1955.

DEFENDANT'S EXHIBIT "BS"

[Title of District Court and Cause.]

DEPOSITION OF WILLIAM U. HEPWORTH

Deposition Suite, Offices of Vernon L. Polk & Associates, 541 South Spring Street, Suites 316-17, Los Angeles 13, California, Wednesday, July 20, 1955.

Appearances: For the Plaintiff: None. For the Defendant: Allan D. Mockabee, Esq., Attorney at Law, 4063 Radford Avenue, Studio City, California. POplar 6-1389. [1]*

Whereupon,

WILLIAM U. HEPWORTH

a witness called by and on behalf of the Defendant, after being first sworn by Vernon L. Polk, CSR, a notary public in and for the County of Los Angeles, State of California, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mockabee): Mr. Hepworth, will you please state your full name and address?

A. William U. Hepworth, 4430 West 63rd Street, Los Angeles (43).

Q. What is your occupation at the present time?

A. Maintaining zipper machines.

Q. At what place?

A. What do you mean, what place?

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* Page numbers appearing at top of page of Original Deposition.

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

Q. At what place?

A. Oh, at Roxy Thread Company, 849 South Los Angeles Street.

Q. You speak of zipper machines; just what do you mean by a zipper machine?

A. Well, it is a machine that stamps out the metal and clamps it onto the tape and manufactures a continuous chain zipper, or in sizes.

Q. I might mention before we go any further, just so you fully understand what this proceeding is, as you probably know, I am going to ask you questions, and you are to answer them, under oath, [2-3] just like you were in court. These depositions are taken to be incorporated in the record of a case now pending in the United States District Court for the Southern District of California. You will be given a copy of these depositions and have an opportunity to correct them if any mistakes have been made, and you will then sign it and swear to it before a notary public.

The fact that no counsel have appeared on the other side does not make the proceeding any less formal than if counsel had appeared or if testimony were given in court.

One other thing: I am not trying to frighten you or anything like that.

A. I am not frightened.

Q. But I would like to have you be very careful with your answers, because we have information to the effect that this particular infringement suit is

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)
being investigated by the Department of Justice, Antitrust Division.

Mr. Lipson: I showed the letter to Mr. Napp.

Q. (By Mr. Mockabee): You stated that you are a maintenance man. Would you please briefly state what your training is in the mechanical field in general, and in the zipper machine field in particular?

A. Well, I was trained by G. E. Prentice Manufacturing Company, in Berlin, Connecticut, and went to school there for a number of weeks, learnt the setup of the presses.

I don't know what else you want to know about it. [4]

Q. In that course of instruction at the Prentice Company, were you instructed as to the complete construction and operation of their zipper manufacturing machines?

The Witness: You want to repeat that last part again?

(Last question read.)

A. Only the operation of the machine, is all that I was instructed on.

Q. At that time did you learn anything about the manner in which the machine was built?

A. No.

Q. Did you become familiar with any of the functional parts of the machine?

A. Just the setting up of the machine.

Q. What do you mean by setting up?

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

A. Well, if a part would wear out, it would be given to you and you would just replace the part. Is that what you meant?

Q. You would replace it in the machine?

A. Yes, it would be supplied to you.

Q. So as a school of instruction, the purpose and result was that you learned the various parts of the machine which were taken out and put back in, is that correct? A. That is correct, yes.

Q. Had you had any previous education or experience with punch presses?

A. I had had no mechanical experience before. I used to [5] manage a grocery store.

Q. When did you go to the school at Prentice Manufacturing Company?

A. I would say approximately 1938.

Q. And you have been engaged in maintaining or working with zipper machines since that time?

A. That is true.

Q. Where have you been employed in connection with the maintenance of zipper manufacturing machines?

A. At G. E. Prentice Manufacturing Company, and I was there approximately two years. And they opened up their Los Angeles plant here, and they I believe operated it approximately a year and it was sold to the Stronghold Manufacturing Company. That is Stronghold Fastener Company, I believe it is. And they hung onto it about a year, and Roxy Company bought it over, and I would say that was

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

approximately, oh, 1940, approximately, and I have been with them since then.

Q. Do you have any connection with the Prentice Company at the present time?

A. Do I have any?

Q. Yes.

A. No, I work for Roxy Company.

Q. Were the machines at the Prentice Company when you received your instruction, and those at Roxy Thread Company, the same general types of machines?

A. Were they punch presses, is that what you mean? [6]

Q. Let me be more specific: Were they the same general types of zipper manufacturing machines?

A. In general, except for a few new—a new process of doing the operation. In other words, it had no slide.

Q. What do you mean by "slide"?

A. The slide would be underneath the die and the punch press would push the unit through the die to be picked up by the slide and then the slide would push it out and clamp it on the tape with a pair of knockers.

Q. What machine is that you are describing?

A. Well, that is the old-type punch press.

Q. The old-type punch press, you say?

A. Yes.

Q. Is that the type used at Prentice Manufacturing Company in instructing you?

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

A. Yes, sir.

Q. Is that the type that is and has been used by Roxy Thread Company?

A. Not completely, no. We have had new machines in the last approximately six years.

Q. Were there any machines at Roxy Thread Company when you went to work for them which did not have the slide? A. No.

Q. When did you first see a machine at Roxy Thread Company without a slide?

A. At that approximate time, about five or six years ago. [7]

Q. Referring to the machines at Prentice Manufacturing Company, when you were there, and those used by Roxy Thread Company when you went to work for Roxy, did those machines have mechanisms for intermittently feeding a flat band or strip into the machine towards the punches on the ram?

A. In other words, did it have a stock feed that fit in the metal?

Q. Yes, in the form of a flat strip?

A. In a flat ribbon strip.

Q. It did, is that true?

A. It had a stock feed to feed the metal in. They have to have a stock feed to feed the metal in.

Q. And these machines had it?

A. Yes. You are speaking technically, and we don't speak so technically, that is the whole thing;

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

I have to stop and think. You are using different terms.

Q. I am using different terminology than you do?

A. That we don't use.

Q. And there was on these machines at Prentice and when you first went to Roxy, a vertically movable punch carrier, or ram?

A. Yes. It's the one and the same machine, is that what you are trying to get at?

Q. I was just trying to identify some of the parts of the machine.

A. It's one and the same machine, what we worked on at [8] Prentice Manufacturing Company is exactly the same machine as when Mr. Napp took it over, if that is what you were trying to get at, or you are just trying to identify certain parts of the machine, am I correct?

Q. That is true, but I also want to identify some parts of it.

And I suppose these machines to which we have referred also had means for feeding a cloth tape to a predetermined position in the machine?

A. That is correct.

Q. At which point the formed elements were applied to the tape? A. That is correct.

Q. When the metal stock or strip was fed into the machine, was it in the form of a smooth flat strip? A. Yes, .100 by .030.

Q. When a portion of the stock or strip was fed beneath the punches, did the punches on the verti-

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

cally movable ram fully form the fastener element?

The Witness: Would you repeat that again?

(Last question read.)

A. No, that didn't fully form it. Originally we had a bushing that formed the tit on the unit, and then it rested in a recess and was punched off of the next operation. Then it was a complete unit.

Q. I didn't mean that they were all formed in one punch.

A. Well, that's the way I understood you to say.

Q. But they were all formed by the single punch carrier or ram, which moved vertically? [9]

A. That's correct.

Q. And the tit or the——

A. You are speaking of the old presses, I imagine, what we used at Prentice?

Q. The old presses that were at Prentice, and that were at first at Roxy? A. Yes.

Q. So that you first formed the tit or recess and projection and then on a succeeding down stroke of the punch carrier, the remainder of the element was formed?

A. The remainder was punched out, punched through the die and onto the slide.

Q. And after punching out the element, was it then applied to the tape and secured to it?

A. It was carried forward by the slide and knockers clinching on the tape.

Q. How far forward was the carrier?

A. I would say about an inch and a half, because

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

the sliding mechanism had to push the knockers out, the carrier, to really clinch it on the tape.

Q. Had to push what out?

A. Push the knockers out.

Q. Describe the knockers, please.

A. Well, the knockers is a piece of, two pieces of steel that are formed to clinch the element onto the tape. [10]

Q. In other words, the slide operated to separate the clinching members, is that what you mean?

A. No, I don't mean that. The front mechanism separates the spacing of the unit.

Q. I don't mean the spacing of the elements. I am speaking of the separation of the knockers or closing jaws as we have called them in the case.

A. Yes.

Q. Is it my understanding that the slide moves the knockers or closing jaws apart so that the element can be placed in position on the tape and then the knockers or closing jaws are brought together to clinch the element on the tape?

A. The knockers clinch the element on the tape. It's all being timed between the punch and the slide.

Q. What operates the knockers?

A. The slide pushes the knockers out.

Q. What operates the slide?

A. Well, you have a back ram that comes in like this (illustrating); and you are timing your vertical ram with the back ram.

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

Q. Is the back, or as you have indicated with your hand, horizontally movable slide actuating ram, operated from the main shaft which raises and lowers the punches? A. That is true.

Q. Would you say that the machine which we have been discussing is an eccentric press? [11]

A. What do you mean by that?

Q. One which is operated by connecting rods, connected from eccentrics on the main power shaft to the punch carrier?

A. It is a crankshaft machine.

Q. With connecting rods and eccentrics, is that true? A. Yes.

Q. All of the mechanism for feeding the stock or metal strip and the tape and for forming and applying the elements to the tape is mounted on a unit on a base, is that true? A. That is true.

Q. Is the ram upon which the punches are carried vertically slidable between a pair of gibs or posts?

A. Does it come out, in other words, is that what you mean?

Q. Does it slide up and down between a pair of gibs or posts? A. No, it is stationary.

Q. I am speaking of the punch carrier.

A. In other words, the ram.

Q. The ram?

A. Yes, the vertical ram. It is stationary. It just has a circular motion.

Q. Has no vertical motion?

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

A. Well, just at the crankshaft point, where it goes around. It is the crankshaft point that drops the——

Q. Drops the ram, is that true?

A. Yes. [12]

Q. Now, what guides the ram, in other words?

A. Well, it has gates to guide the ram.

Q. Are there grooved or channeled posts on either side of the ram?

A. Deep channel, yes, on either side. This ram can be raised or lowered, you know.

Q. To adjust the stroke?

A. To adjust the stroke.

Q. Yes. A. But is only a short stroke.

Q. But I was speaking of the general operation movement.

A. It is just a crankshaft, drops down and comes back up.

Q. Do you recall how long a stroke that has, the ram?

A. I believe it was an inch and a half. Now, I am guessing that. I don't actually know. I would guess it to be that.

Q. Did these earlier machines you speak of operate to produce a single zipper stringer, or two zipper stringers, at the same time?

A. They were single. One side is all they produced.

Q. Were the newer machines single or double-header machines?

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

A. They were single; they are single.

Pardon me, I imagine you are speaking about the streamlined unit, aren't you?

Q. I am speaking——

A. Zippers in general, are you speaking? [13]

Q. I am speaking of machines that make one or two stringers simultaneously.

A. No, we make one stringer, and always have, on both the new and the old machine.

Q. Did any of these machines in the formation of a zipper element completely punch out any material from the strip?

A. That is the complete element, all in one stroke?

Q. No, I am speaking of the manner in which it is formed in first the recess and projection, and then in the remainder of the element being punched out. In its formation, is any part of the strip punched out and wasted?

A. No, none at all.

Q. In forming the zipper elements, which as you have described results from punching them out of the metal strip or stock, is the head, or what ends up as the projecting portion of the zipper element on the tape, formed by punching out a part of the stock and simultaneously forming the legs of the next element?

A. Which machines are you speaking of?

Q. On any of them; if so, describe which.

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

A. No, the projection, as you call it, is formed by either a bushing in a tit punch——

Q. No, I believe you misunderstood me. I mean the head end as distinguished from the leg end of the element; is the head end formed by punching out material in the strip which also forms the legs of the next element? [14]

A. It is punched out in one operation. You form the head and the legs without scrap, in one operation.

Q. And the head of the lead element comes out of the portion between the legs of the following element, is that true? A. That is true, yes.

Q. Is one element completed at each stroke of the ram?

A. One element is punched out at each stroke of the ram.

Q. In other words, it is completely formed except for the just preceding formation of the tit or recess and projection?

A. That is true. The tit and the cup hole is formed in one operation.

Q. Are the closing jaws for clamping the elements on the tape mounted in a manner in which they slide on the machine?

A. They slide in a holder.

Q. What actuates the jaws? Is it a lever actuation, a cam actuation, or what is it?

A. It is a cam actuation.

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

Q. And the jaw actuation is timed in sequence with the operation of the punches, is that true?

A. Yes, to a degree.

Q. In other words, is there a synchronized movement of the ram with its punches, and the movement of the jaws?

A. The movement of the ram; it is synchronized with the movement of the ram.

Q. The jaws are? [15] A. Yes.

Q. Is the means for feeding the metal strip a roller feed? A. Yes, the roller stock feed.

Q. Are the rollers corrugated or in some way surfaced so that they grip the strip?

A. Well, you see, you are talking about two different machines. One——

Q. Are they different on the two machines?

A. They are different on the two machines, yes.

Q. What type of feed was on the earlier machine? A. A flat roller feed.

Q. Smooth roller, you mean?

A. Smooth roller, yes, sir.

Q. And on the later machine?

A. It is a corrugated one.

Q. Are the rollers under spring pressure of any kind? A. Yes, sir.

Q. Are they both driven? A. Yes, sir.

Q. What type of intermittent feed mechanism is used in connection with the feed rollers?

A. Well, they work off the main cam.

Q. Isn't that roller operation intermittent? Do

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

the rollers rotate continuously, or do they stop at intervals? A. They stop at intervals. [16]

Q. What gives this intermittent motion to the rollers?

A. Well, on the old press, we used to work them with chain, that had a lug on it, that would throw it. On the new one, it just works off the cam and stops the stock feeding. The punch still goes up and down, but the stock stops dead.

Q. There is no ratchet feed of any kind?

A. Yes, there is a ratchet feed.

Q. What type of tape feed was on the two types of machines? A. A ratchet feed tape puller.

Q. Did the tape feed have one or two rollers?

A. Double rollers.

Q. Double rollers? On both machines?

A. Both machines.

Q. Are those rollers under pressure toward each other? A. Spring pressure.

Q. Is any means provided in the form of a brake or similar device to prevent the tape from backing up?

A. On the old machines, there was a device, a roller spring device to prevent that.

Q. You mean a separate roller device from the feed rollers?

A. In between the two rollers, there was one that held the sizing.

Q. By sizing you mean tape, is that true?

A. Yes, sir.

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

Q. Did either of the machines referred to have any means [17] for holding the tape under tension? That is, that portion of the tape upon which the zipper elements are being applied?

A. Well, it was held under tension from beneath, by a tape clamp.

Q. Was that a friction shoe or something like that?

A. It was just a set of clamps with a clearance for the bead to go through.

Q. The bars or rods pressed together?

A. That's right.

Q. And the tape spread between them to retard the movement of the tape or to hold it under tension?

A. To hold it under tension so that you could space each unit a correct amount of distance apart.

Q. They were on the old machines and the new machines, is that true?

A. That is correct, in different, in a little different forms, slightly.

Q. But the function was the same?

A. The same idea, yes, under the spring tension.

Q. Do you remember when you first went with Prentice, or while you were with Prentice, the speed of operation of those machines?

A. This would be purely a guess on my part: I would say about 275 to 350, in those days.

Q. Upon what do you base your guess?

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

A. Well, we did time some older machines. It just looked [18] about that, as a guess.

Q. Did you have any method for timing the speed of machines?

A. We did a number of years ago, yes.

Q. How did you do that?

A. Well, you have an automatic timer that you stick on the flywheel that counts the revolutions of the machine.

Q. And from the number of revolutions you could compute the speed of the machine?

A. Plus the work of the machine.

Q. Were the Prentice machines speeded up while you were working for Prentice?

A. Well, they were slightly; maybe once while I was there, they speeded them up slightly.

Q. Do you know approximately how much that would be? A. No, I don't.

Q. Were the machines at Roxy Thread Company speeded up to any extent?

A. Yes, we speeded them up to 500 revolutions a minute.

Q. Do you know when that was?

A. Oh, approximately 1941 or 1942.

Q. Have they been increased in speed since then?

A. In the new type of machine. We don't have any, haven't had any old type machines in five or six years now. The new type has been speeded up.

Q. How fast do they operate? [19]

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

A. We haven't timed them, but the new motors we put on are supposed to be about 1,700.

Q. Would the motor speed reflect the production speed of the machine? A. Oh, yes.

Q. How did you determine the speed up to 500 revolutions in 1941 or 1942?

A. We had a timer that we did timing with.

Q. Did you do the timing, or did someone else do it? A. Someone else did the timing.

Q. Did you witness it? A. I witnessed it.

Q. And the old Roxy machines were not speeded up above 500, is that true?

A. No, that type of machine wouldn't — it wouldn't be profitable to speed it up, I don't imagine.

Q. Why is that?

A. Well, it was a belt-driven machine.

Q. You mean there was a belt from the motor to the main shaft of the machine?

A. That's true.

Q. Was the machine itself capable of faster operation with a different type of drive?

A. The same machine? That's my opinion, you are asking for? [20]

Q. Yes, from your experience with zipper machines.

A. Well, the cam probably would have to be worked over, and you had too long a stroke in it. With an inch and a half stroke, it had a sliding key that if it ever shut off without any braking

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

device, it would fly all around the room. You couldn't stop it. It would have to be redesigned entirely.

Q. Could that change adapted to a higher speed be made by a person familiar with the operations of the machinery?

A. I wouldn't say so, no, not familiar with the operation; familiar with building a zipper machine.

Q. A person familiar with building zipper machines? A. I would say so.

Q. Were you familiar with the building of zipper machines?

A. No, I am just familiar with the operation of the machine.

Q. Do you know how to compute machine production speed from the speed of the motor, the speed of the main shaft, or the speed of the motor and the size of the pulleys on the main shaft?

A. I would know if I knew how many units per inch.

Q. How many zipper elements per inch?

A. Yes.

Q. How do you figure that?

A. Well, you would have so many revolutions a minute, and you would count the inches that a person was putting out, and you could figure out how many——

Q. Just simple arithmetic, is that it? [21]

A. Just simple arithmetic.

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

Q. Yes. On these old machines, what was the motor speed?

A. The speed I don't know. I know, I told you the speed that the press was running.

Q. These old machines were motor-driven, weren't they? A. Yes, belt-driven.

Q. From a motor? A. Yes, sir.

Q. Do you remember the sizes of the pulleys on the motor, pulley on the motor?

A. Well, we had a series of pulleys. The 5-inch was the one that took us to 500, I am fairly sure of that.

Q. Five-inch pulley on the motor shaft?

A. Yes.

Q. Do you remember the pulley on the crank-shaft of the zipper machine?

A. Just the flywheel is on there.

Q. Well, the belt ran from the motor pulley to a pulley on the—— A. To a flywheel.

Q. To a flywheel? A. Yes.

Q. How big was the flywheel?

A. I don't know.

Q. Would you approximate the size of it? [22]

A. Fifteen inches.

Q. Fifteen? A. In diameter.

Q. Then your motor I suppose ran at 1,750, is that it? A. On the old machines?

Q. Yes. A. No.

Q. The electric motors? How fast, 1,725?

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

A. 1,700 on the new ones, the plate states. I believe I told you I didn't know what the——

Q. Oh, I beg your pardon.

A. The one on the old machines ran; but it did run 500 revolutions a minute on a 5-inch pulley.

Q. It was a standard motor?

A. It was a standard motor.

Q. And that was you say 500, that was on the Roxy machine, on the old Prentice machine?

A. Yes.

Q. On a No. 3 zipper, do you recall the spacing of the zipper element or the number of elements per inch on the tape?

A. I don't know anything about a No. 3.

Q. Do you know the——

A. We only make streamline out here, No. 2's.

Q. No. 2, what is the number of elements per inch on those? A. Thirteen per inch. [23]

Q. Prior to the giving of this testimony, have you discussed the matter with anyone?

A. Just with Mr. Napp, that's all.

Q. What was the general trend of your discussion?

A. Just the process of the new machine, and how we made the zipper.

Q. Weren't you already familiar with it?

A. I was, but Mr. Napp wasn't, not familiar.

Q. Oh, I see; you were sort of bringing him up to date on how his machines worked, is that true?

A. The technical data on it. Mr. Napp could

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

work on the old machines slightly, very, very slightly, but the new ones, he hasn't done anything on them.

Q. Did you discuss the giving of this testimony with anyone else?

A. No. You mean about the subpoena? I told the office man that I got a subpoena.

Q. No, I meant the testimony which you were going to give. A. No.

Q. Did anyone, Mr. Napp or anyone else, give you instructions as to what to testify to?

A. Just tell the truth, that's all.

Q. Fine. Do you know where the present Roxy Thread Company machines came from?

A. From Prentice. [24]

Q. They were purchased from Prentice, is that true?

A. They are licensed by Prentice. They own the machines.

Q. Prentice or Roxy? A. Prentice.

Q. Oh, Prentice owns them and leases them to Roxy Thread? A. That is correct.

Q. Do the Roxy Thread machines have any serial numbers? A. I believe they do.

Q. Do you know what they are?

A. I don't know.

Q. Roughly?

A. I wouldn't even guess. I don't know anything about it. I know they have a plate on them.

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

Q. Do you recall if the numbers are over or under a hundred?

A. I wouldn't even guess, because I don't know.

Q. How many machines does Roxy have?

A. Nine.

Q. Have you at any time seen any other zipper manufacturing machines? A. No, I haven't.

Q. Did you have any, or did Roxy Thread have any machines in 1940 or 1941 which operated as high as 1,200 r.p.m.? A. No.

Q. Did you ever see any motors on any Roxy machines which stated a speed of less than 1,725 r.p.m.? [25] A. No, sir.

Q. I believe when we first started talking about speed of machines, you said something about the machines at Prentice when you were there, operating at 275 to 350 r.p.m.?

A. That is a guess.

Q. Now, based on your knowledge of ordinary standard electric motors, with I think you said about a 5-inch pulley on the motor shaft, is that correct? A. That is correct.

Q. Wouldn't you have to have a pretty good-size flywheel on the zipper punch press to get down to a speed of 275 to 350?

A. Mind, your pulley is regulating your speed; your flywheel remains the same.

Q. I mean with a 5-inch pulley and——

A. Now, you are speaking about Prentice machines now?

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

Q. Yes.

A. Prentice machines, at Prentice, never had a 5-inch pulley.

Q. Do you remember how big they were?

A. I couldn't tell you.

Q. Approximately?

A. Not even approximately.

Q. You remember approximately what size the flywheel was on the Prentice?

A. The same size as what Roxy has. [26]

Q. About 15 inches I think you said?

A. That's a guess.

Q. Approximately?

A. Yes, Prentice was belt-driven, belt-driven from overhead, whereas Roxy was individually mounted motors.

Q. Just to clarify one little thing there: In the mechanism for forming the elements, do the punches carried by the vertically reciprocating ram, reciprocate downwardly toward and upwardly away from cooperating dies?

A. Up-and-down motion, correct.

Q. And the dies are stationary on the base and the punches are movable with the ram, is that correct? A. Yes, sir.

Q. And the punches are all located close together on the under side of the ram block?

A. In a punch block.

Q. In a punch block. At the time you went to work for Prentice, and after you had been there a

Defendant's Exhibit "BS"—(Continued)

(Deposition of William U. Hepworth.)

while, did you know the comparative speeds of Prentice machines and those of other manufacturers?

A. No, I didn't. I didn't even know there was any other manufacturers when I first went there.

Q. Did you later learn the comparative speeds of Prentice machines with those of other machines?

A. Just hearsay, from what is in the trade, every zipper man would know. [27]

Q. How did the speed of the Prentice machine compare with the speeds of other machines?

A. Well, I didn't know that until many years later, in fact, until I was out here in Los Angeles.

Q. Do you know Howard Treloar?

A. Yes, sir.

Q. Is he employed by Roxy? A. Yes, sir.

Q. Was he employed by Roxy before or after you? A. About the same time.

Q. Do you know when he first was employed by Prentice?

A. No, I don't. It was a few years before myself.

Q. What is his capacity with Roxy Thread Company? A. He is a maintenance man.

Q. He does the same type of work that you do?

A. Yes, sir.

Q. Who grinds the tools at Roxy Thread?

A. We grind the tools.

Q. That is, you and other employees?

A. Yes, sir.

Defendant's Exhibit "BS"—(Continued)
(Deposition of William U. Hepworth.)

Q. How many of you?

A. Just the two of us.

Q. What portions of the machine require grinding or regrinding?

A. The punch and the die, and the insert, I should say. [28]

Q. The die insert, you mean? A. Yes.

Q. Do you as a part of your duties periodically check the machines to determine whether the punches need resharpening or regrinding?

A. Yes, sir.

Q. As your tools wear to the point where they need replacement, who makes the new tools and new punches?

A. They are purchased from Prentice.

Q. They are purchased?

A. The Prentice Manufacturing Company.

Q. Are there any facilities at Roxy Thread for manufacturing and replacing any parts on the machines? A. Just the knockers, that's all.

Q. The knockers are what we have called the—— A. That closes the elements.

Q. The closing jaws? A. Yes, sir.

Q. Who makes the new knockers?

A. Treloar makes the new knockers.

Q. Do you make any parts for the machines at all? A. No, I don't.

Mr. Mockabee: I think that's all. Thank you very much, Mr. Hepworth.

(Deposition of Witness Hepworth concluded at 11:30 a.m.) [29]

The undersigned certifies that he has read the foregoing testimony adduced at the place and on the date shown in the above-entitled cause; that the twenty-nine (29) pages of testimony constitute a full, true and correct transcription of said testimony; and that changes, alterations or modifications, if any, have been noted by the notary public, Florence J. Farnsworth, at my suggestion, and initialed by me in each instance.

Los Angeles, California, August 9, 1955.

/s/ WILLIAM U. HEPWORTH,
Deponent. [30]

[Endorsed]: Filed Sept. 27, 1955.

[Endorsed]: No. 15714. United States Court of Appeals for the Ninth Circuit. Talon, Inc., a corporation, Appellant, vs. Union Slide Fastener, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 13, 1957.

Docketed: September 18, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15714

TALON, INC., Plaintiff,

vs.

UNION SLIDE FASTENER, INC., Defendant.

STATEMENT OF POINTS FOR PLAINTIFF-APPELLANT

The points of error of the District Court which plaintiff intends to urge on appeal from the judgment of the Court in favor of defendant in the above-entitled action are as follows:

I.

The District Court erred in adjudging that Claims 1 through 4, 16 and 17 of United States Letters Patent No. 2,078,017 to Poux are invalid and void.

II.

The District Court erred in adjudging that Claims 1 through 4, 16 and 17 of United States Letters Patent No. 2,078,017 to Poux are not infringed by defendant.

III.

The District Court erred in adjudging that Claims 1 through 4, 13 and 32 through 40 of United States Letters Patent No. 2,437,793 to Silberman are invalid and void.

IV.

The District Court erred in adjudging that Claims 1 through 4, 13 and 32 through 40 of United States Letters Patent No. 2,437,793 to Silberman are not infringed by defendant.

V.

The District Court erred in adjudging that defendant have and recover from plaintiff the sum of $20,000.00 in attorneys' fees.

VI.

The District Court erred in finding that Sundback Patent No. 1,331,884 was in successful use prior to Poux Patent No. 2,078,017.

VII.

The District Court erred in finding that Poux Patent No. 2,078,017 did not solve a problem but its disclosure merely stated a problem and a desirable end result or that it did not teach a workable manner or means of accomplishment of the desired result.

VIII.

The District Court erred in failing to find that Poux Patent No. 2,078,017 disclosed a method and an apparatus for carrying out the method which could be made fully operative and functional without the exercise of invention by any person having ordinary skill in this art.

IX.

The District Court erred in finding that Claims

1 through 4, 16 and 17 of Poux Patent No. 2,078,-017 are invalid by reason of a prior disclosure in the art of the method of achieving the end result desired by Poux.

X.

The District Court erred in failing to find that while plaintiff's machine, Exhibit 5, has improvements over Silberman Patent No. 2,437,793 the same embodies the patented invention of said patent and each of the essential elements thereof or its full mechanical equivalent.

XI.

The District Court erred in finding that the patent to Smith No. 1,533,352 relating to paper box fasteners is in an art related to the alleged method of the claims in issue of Poux Patent No. 2,078,017.

XII.

The District Court erred in finding that plaintiff's proof fails to show that a machine of the claims in issue of Silberman Patent No. 2,437,793 ever operated.

XIII.

The District Court erred in entering Finding No. XXI and in permitting the defendant to attempt to impeach its own witness, Loew.

XIV.

The District Court erred in finding that Silberman entered into a verbal license agreement with defendant and subsequent actions of defendant including expansion of defendant's facilities for manufacturing zippers were made in reliance upon that license.

XV.

The District Court erred in finding that defendant relied upon plaintiff's McKee's statement to defendant's Loew that no patents of plaintiff were infringed, and in reliance upon that statement, defendant continued to work on machines it was manufacturing and expended money in expanded manufacturing facilities.

XVI.

The District Court erred in entering Finding No. XXV reading as follows:

"Letters, Exhibits 15 and 18, alleged to be notices of infringement on behalf of Silberman to defendant, were written prior to Silberman's conversation with Loew and Lipson about August 15, 1948 and therefore were prior to the license granted by Silberman to defendant."

XVII.

The District Court erred in finding that Silberman was not the sole inventor of the device of the claims in issue of his Patent No. 2,437,793 and it was at least in part the work of Havekost.

XVIII.

The District Court erred in finding that the conference in Los Angeles between plaintiff and the local zipper manufacturers in that city in 1949 was held in an attempt by plaintiff to maintain price control and evidenced an intent to misuse plaintiff's patents and to violate the antitrust laws.

XIX.

The District Court erred in finding that the

license agreements entered into by plaintiff produced the net result that the product of plaintiff's licensees was curtailed.

XX.

The District Court erred in finding that the contract, Exhibit 7, clearly ties in unpatented with patented art when the licensee exceeded its quota of production provided for.

XXI.

The District Court erred in entering Finding No. XXXIX reading as follows:

"The activities of plaintiff in which numerous suits were filed and settled without trial upon the grant of quota licenses which amounted to a scheme to restrict the production of competitors are apparent, and typical of these activities was plaintiff's commencement of the present action after McKee, an official of plaintiff, had found no infringement and plaintiff apparently made no further inspection or investigation."

XXII.

The District Court erred in entering Finding No. XXXX reading as follows:

"Plaintiff intended and attempted to monopolize a substantial part of the zipper market, has misused its patents and has unclean hands."

XXIII.

The District Court erred in finding that plaintiff's acts in connection with the restricted licenses must necessarily have created a substantial impact

on the supply of zippers in interstate commerce in the United States and there was public injury.

XXIV.

The District Court erred in entering Finding No. XXXXIII reading as follows:

"Plaintiff's conduct is convincing that it considered the validity of Poux '017 and Silberman '793 as being questionable and had not heretofore permitted their adjudication."

XXV.

The District Court erred in entering Finding No. XXXXV reading as follows:

"The action was brought by plaintiff in bad faith and without reasonable belief in the validity of the patents and the litigation proves harassment and misconduct on plaintiff's part."

XXVI.

The District Court erred in entering Finding No. XXXXVI reading as follows:

"Plaintiff, under the pretext of examining defendant's machinery to determine possible patent infringement of which it had no actual knowledge, secured consent to examine defendant's machinery only for the purpose of determining whether infringement existed, and while under color of such an examination learned of a number of improvements which defendant had made upon zipper machinery and copied defendant's improvements in plaintiff's machinery, Exhibit 5, without compensation to defendant. These improvements by defendant are those listed in Finding XII."

XXVII.

The District Court erred in entering Finding No. XXXXVIII reading as follows:

"Having considered the acts of plaintiff leading up to the prosecution of this action against defendant and the fact that plaintiff has acted in bad faith and with unclean hands and has misused its patents, defendant is entitled to reasonable attorneys' fees. Taking into consideration the nature and complexity of the case; the length of the trial; the depositions taken; the experience, standing and eminence of counsel; the quality of skill demonstrated; the importance of the case to the plaintiff and defendant; the risk of the client and responsibility of the counsel; the time fairly and properly expended in preparation out of court; time in court; and the results accomplished, it is found that the reasonable value of the services of attorneys for the defendant is Twenty Thousand Dollars ($20,000.00).

"In considering the relative importance of the work done by defendant's attorneys with regard to violation of the antitrust laws, while it was done in part in support of defendant's counterclaim, it was also done as part of the work showing the defense of unclean hands and the material regarding antitrust violations was used as a shield in defense of the patent suit as well as a sword in connection with the counterclaim. It was nearly all pertinent to the defense to plaintiff's action, even though the counterclaim failed.

"It is found that the antitrust problem is the only substantial issue if an appeal is taken. To provide for the contingency, that on appeal the reviewing court should find no violation of antitrust laws and be confronted with an apportionment of fees, and a remand for the purpose of fixing of fees without regard to services rendered on the antitrust violation, then, excluding the services regarding antitrust violations; the reasonable value of attorneys' fees for defendant is Eighteen Thousand and Five Hundred Dollars ($18,500.00)."

XXVIII.

The District Court erred in concluding that Poux Patent No. 2,078,017 and claims 1 through 4, 16 and 17 thereof is invalid as being anticipated by the prior art and because it did not teach a workable method.

XXIX.

The District Court erred in concluding that Silberman Patent No. 2,437,793 is invalid in view of the prior art as being an aggregation and not a patentable combination bringing about a new result and plaintiff's proofs failed on the issue that the machine of Silberman '793 ever operated.

XXX.

The District Court erred in concluding that the understanding between Silberman and defendant on or about August 15, 1948, was relied upon by defendant which changed its position in reliance thereon and defendant was therefore licensed under Silberman '793.

XXXI.

The District Court erred in concluding that plaintiff purchased Silberman '793 subject to the existing licenses from Silberman to defendant and was estopped from thereafter withdrawing the license or charging that the defendant infringed.

XXXII.

The District Court erred in concluding that Silberman was not the sole inventor of his patent in suit.

XXXIII.

The District Court erred in concluding that Poux '017 is invalid on its face as not teaching a method but an end result.

XXXIV.

The District Court erred in concluding that reliance by defendant upon Silberman's statement that he would not sue defendant for infringement under his patent '793 if defendant refrained from selling machines in certain export markets and plaintiff's officer McKee's report to plaintiff which failed to indicate infringement and McKee's statement to Loew, former president of defendant, that there was no infringement, and defendant's reliance thereon which included expansion of defendant's facilities created an estoppel against plaintiff to subsequently assert infringement and constituted a waiver by plaintiff of a right to sue.

XXXV.

The District Court erred in concluding that by reason of the license agreements entered into be-

tween plaintiff and a number of other competing companies, and by further reason of conduct of plaintiff, plaintiff was guilty of misuse of its patents, bad faith, unclean hands and violation of the antitrust laws. Therefore, plaintiff is not entitled to maintain this action even if the patents in suit were valid and/or infringed.

XXXVI.

The District Court erred in concluding that plaintiff's contracts between it and competing companies and its attempts to control prices in the Los Angeles area accompanied by a threat of a price war if prices were not controlled, constitute a violation of the antitrust laws.

XXXVII.

The District Court erred in concluding that the production restricting contracts entered into between plaintiff and its competitors, the circumstances under which many of those contracts were made, the attempt to control prices in the Los Angeles area, the introduction of a cheaper and inferior brand of zipper in the Los Angeles area subsequent to the attempt to control prices there, the appropriation by plaintiff of improvements made by defendant on its machines under the guise of an infringement investigation, and the purchase of the Silberman patent '793 shortly prior to suit against defendant and the subsequent filing of said suit all constitute steps in a deliberate scheme to control zipper production in the Los Angeles area and throughout the United States.

XXXVIII.

The District Court erred in concluding that plaintiff was guilty of bad faith amounting to fraud in securing consent to inspect defendant's machinery for possible patent infringement and in utilizing such inspection to gain from defendant numerous improvements in zipper machinery which were incorporated in plaintiff's machines without compensation to defendant.

XXXIX.

The District Court erred in concluding that plaintiff through its license agreements with competitors compelled the payment of royalties on unpatented materials and therefore misused its patents in violation of the antitrust laws.

XXXX.

The District Court erred in concluding that the antitrust laws may be used as a shield as well as a sword and are available in this case as a complete defense against infringement and the validity of the patents.

XXXXI.

The District Court erred in concluding that as a matter of law the patents in suit have been misused.

XXXXII.

The District Court erred in concluding that the acts of plaintiff in misuse of its patents and in violation of the antitrust laws substantially affected interstate commerce in zippers and the public was injured.

XXXXIII.

The District Court erred in concluding that in view of the conduct of plaintiff in connection with events leading up to and the bringing of this suit, as set forth in the findings of fact, it is held that defendant is entitled to an award of attorneys fees in the amount of Twenty Thousand ($20,000.00) Dollars. In the event that on appeal the reviewing court should find no violation of the antitrust laws and be confronted with an apportionment of fees, and a remand for the purpose of fixing such fees without regard to services rendered on the antitrust violation, it is found that, excluding services regarding antitrust laws violations, the reasonable value of attorneys fees for defendant is Eighteen Thousand Five Hundred ($18,500.00) Dollars.

XXXXIV.

The District Court erred in failing to conclude that prior to the trial of this action, plaintiff had purged itself of any possible illegal conduct under the antitrust laws and had thoroughly cleansed its hands.

Dated at Los Angeles, California, this 18th day of September, 1957.

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Plaintiff-Appellant.

Affidavit of Service Attached.

[Endorsed]: Filed Sept. 19, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Comes now the appellant, Talon, Inc., and pursuant to Rule 17(6) of this Court designates as the record upon appeal the entire transcript of record as certified by the Clerk of the District Court for the Southern District of California, including specifically:

Complaint filed 10/17/49

Interrogatories propounded to Defendant Under Rule 33 FRCP filed 11/21/50

Amended Answer and Counterclaim filed 4/19/51

Reply to Counterclaim (plaintiff) filed 5/5/51

Defendant's Answer to Plaintiff's Interrogatories filed 5/10/51

Further Interrogatories Propounded to Defendant under Rule 33 FRCP filed 7/26/51

Defendant's Answer to Plaintiff's Interrogatories filed 3/3/52

Interrogatories Propounded to Plaintiff Under Rule 33 FRCP filed 3/28/52

Plaintiff's Answers to Interrogatories Propounded by Defendant and Served March 18, 1952 —filed 5/8/52

Plaintiff's Answer to Interrogatory No. 83 in Interrogatories Propounded by Defendant and served March 18, 1952—filed 5/8/52

Minute Order (copy) dated 11/24/52

Further Interrogatories Propounded to Plaintiff filed 12/11/52

Plaintiff's Answers to Interrogatories Pro-

pounded by Defendant and Served December 10, 1952—filed 2/19/53

Pretrial Stipulation and Order filed 3/30/53

Handwritten list of exhibits and witnesses

Amendment to Reply to Defendant's Counterclaim filed 3/8/55

Amendment to Defendant's Amended Answer and Counterclaim filed 3/15/55

Memorandum to Counsel filed 7/17/56

Minute Order (copy) dated 7/17/56

Memo to Counsel re Attorneys Fees filed 8/13/56

Amended Answer filed 10/1/56

Findings of Fact, Conclusions of Law and Judgment

Notice of Appeal

Designation of Record on Appeal

Motion re extension of time in which to file and docket record on appeal

Eleven (11) Volumes of Reporter's Official Transcript of Proceedings had on 3/11, 3/1, 3/2, 3/3, 3/4, 3/8, 3/9, 3/10, 3/15/55; 8/2 and 8/3/56; and 11/26/56

Plaintiff's Exhibits 1 to 22, inclusive

Defendant's Exhibits A to Z, inclusive, AA to AO, inclusive, AQ to AY, inclusive, BB to BZ, inclusive and CA and CB

Depositions of: Philip Lipson, filed 7/18/52, marked as Plf's Exb. 6.; Sigmund Loew, filed 12/15/52, marked as Defendant's Exb. Q, Robert Eisenberg, marked as Defendant's Exhibit AK, Wilbur B. Jager, filed 12/8/52, marked as Defendant's Exhibit AI; Isadore O. Napp, filed 12/10/52,

marked as Defendant's Exhibit AL; C. F. Detweiler, filed 1/8/53, marked as defendant's Exhibit AJ; John T. Havekost, filed 1/17/55, marked as Defendant's Exhibit AM; William Wray, filed 3/1/55, marked as Defendant's Exhibit AN; Isadore Napp, filed 9/27/55, marked as Defendant's Exhibit BR; William U. Hepworth, filed 9/27/55, marked as Defendant's Exhibit BS

Brown envelope containing exhibits to deposition of Philip Lipson, and

This designation.

Dated at Los Angeles, California, this 18th day of September, 1957.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Plaintiff-Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 19, 1957. Paul P. O'Brien, Clerk.